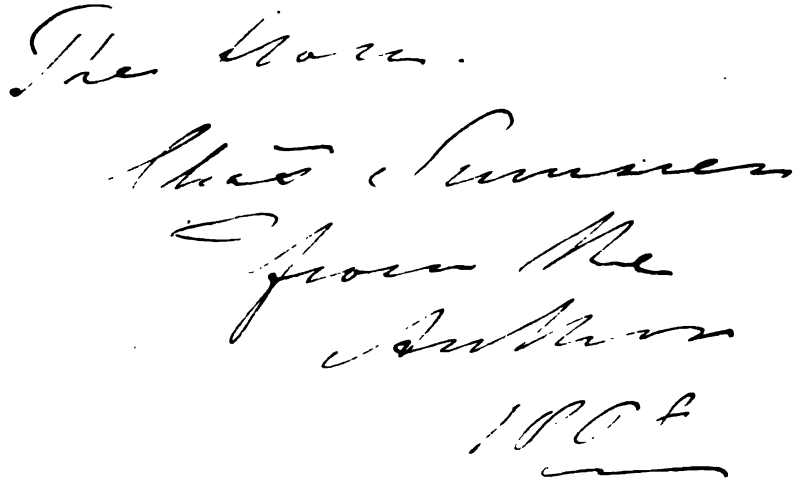

THE INSTITUTES

OF THE

ROMAN LAW.

PART I.

CONTAINING AN ACCOUNT OF THE SOURCES OF THE ROMAN LAW FROM THE EARLIEST PERIOD TILL THE DECLINE OF THE WESTERN EMPIRE.

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LONDON:
BUTTERWORTHS, 7, FLEET STREET,
LAW PUBLISHERS TO THE QUEEN'S MOST EXCELLENT MAJESTY.
EDINBURGH: CLARK, AND BELL & BRADFUTE.
DUBLIN: HODGES, SMITH & Co.

1867

LONDON:
PRINTED BY ARLISS ANDREWS, 7, DUKE STREET, BLOOMSBURY, W.C.

TO

DR. KARL ADOLPH VON VANGEROW,

Knight, Privy Councillor in the Grand Duchy of Baden, and Professor of Roman Law in the University of Heidelberg.

DEAR SIR,

To you I offer this volume on the Roman Law, for it was under your instruction that I first satisfied my cravings in this department of jurisprudence. I look back with feelings of inexpressible pleasure to the happy years spent in the University of Heidelberg. To have heard your noble lectures, and to have enjoyed the friendship of Von Vangerow and Mittermaier, I esteem among the greatest privileges of my life.

With much respect,
My dear Geheimrath,
I remain, yours faithfully,
FREDERICK TOMKINS.

PREFACE.

THE Introduction will sufficiently explain that the present work, of which the first instalment is now presented to the public, is strictly elementary. It is believed that it contains information that will be useful to students of the law, and not only to them, but to others who feel an interest in general jurisprudence. The second part is well advanced as far as the manuscript is concerned. This is mentioned to assure those persons who purchase the first volume that the second will be forthcoming when required. The subsequent part will treat of the following subjects, and in the same order as here indicated. Rights and the Actio, Possession, Property, Obligations, and the Law of Succession or Inheritance. The Institutes of the Roman Law, as far as Rights and the Actio,

as well as Obligations, are already written. Materials for the other subjects are also at hand. If this work should find favour with the profession and the public, it is intended to publish the History of Roman Private Law, and also a more minute and careful treatise on Modern Civil Law.

I am under great obligations to the Rev. John Waddington, D.D., and to William G. Lemon, Esq., LL.B., Barrister-at-Law of Lincoln's Inn, for their careful perusal of all the proof sheets.

FREDERICK TOMKINS, M.A., D.C.L.

Temple, June 5th, 1867.

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INTRODUCTION.

THE object of a Treatise on the Institutes of the Roman Law should be to present a compact and brief explanation of the private law of Rome as it existed at the time of Justinian. It may be asked of what advantage is the study of the ancient laws of a people long since extinct—of laws which, to be satisfactorily studied, must be contemplated through the medium of a language that has ceased to be spoken? To the student of jurisprudence on the continent of Europe this question is easily answered. To the German jurist the importance of this study is evident. In Germany the Roman law is no longer a foreign law, but either forms a substantive part of the law or, as in Prussia and Austria, lies at the very basis of the national jurisprudence. Its introduction into the legal system of these continental nations was not a mere accident, and by those who are competently acquainted with the barbarous institutions of the primitive tribes, the introduction of the Roman law is not regarded as an evil. There is a point when the stern primitive laws of a rude people, must yield to more reasonable and scientific principles. It was even so with the Romans themselves; the strictness

of the *jus civile* was not proof against the laws of the neighbouring Italian tribes known as the *jus gentium*. We cannot deny the fact, that for many centuries the jurisprudence of ancient Rome has exerted an immense influence on all the nations of Europe; and although it has been supposed, and probably with correctness, that England has been least influenced by these ancient laws, fuller information as to our own jurisprudence and a more accurate acquaintance with the laws of Rome, added to the more searching investigations of the present time, will prove that our own legal system has been affected to a much greater extent by the Roman law than it has been the fashion to admit. Mr. Long has briefly indicated the extent to which our Bracton was under obligations to the Roman law. Whilst Bracton divides his work, "De Legibus et Consuetudinibus Angliæ," into five books, the general arrangement is that of the Institutes of Justinian. (*a*) The definitions of Bracton are often mere modifications of the definitions of the Roman law, and the student of the Roman law as it existed in the middle ages will derive valuable assistance even from the perusal of the writings of Bracton. (*b*)

There is also a period in the jurisprudence of civilized states when legislation, that has been fragmentary and unscientific, advances to the stage of codification. That England is approaching to the period when its entire system of laws must be codified, some of our ablest living jurists do not hesitate to affirm, and indeed, this codification has, in some special departments of our

(a) See Geo. Long's Two Lectures in the Middle Temple, p. 93. 1846-7

(b) Prof. Mittermaier, of Heidelberg, stated to the author that Savigny had told him that he had derived considerable aid in writing his "History of the Roman Law in the Middle Ages," from the perusal of Bracton. See also Maine's Ancient Law, p. 82.

legislation been partially attempted. A code can only rest upon that for a basis which is already received; it is upon the *jus receptum* that it must be based. It is not, however, upon the mere accidents of legislation, that a code can repose; but mainly upon those universal and scientific principles which are found in the jurisprudential systems of every age and every nation.

Upon such a strictly scientific basis did the laws of Rome in an eminent degree repose. During a long succession of ages their jurists strove, with an acuteness and care that reflect honour on the human intellect, to avoid every flaw in their legal principles; or, as they technically expressed it, to avoid everything that was *inelegans*—that is to say, everything that was contrary to analogy, or did violence to the symmetry and beauty of their legal system. It is thus not to be wondered at, that the jural principles of such a nation should have influenced the laws of the civilized nations of this eastern hemisphere during the march of fifteen centuries. Nor will it seem strange, that our most eminent judges in the various departments of our jurisprudence have found the clue to the solution of many difficulties in the principles of the Roman law. The most valued decisions of a Holt, a Kenyon and a Scott, and especially the fine distinctions of the last, were simply pertinent and able interpretations of the principles of the Civil law. The scientific value of the Roman law is also established by another fact—namely, that in France, in Austria, and in Prussia, where the legal systems have assumed the form of codes, the principles of the Roman law are first taught as furnishing the best basis for all subsequent legal knowledge; and an acquaintance with these principles is regarded in these countries as indispensable for the educated jurist.

But it may be asked, why should the study of the Roman Law occupy the mind of the student at the very threshold of his course? The simple reply is, because it will be found to lie at the foundation of our own jurisprudence. It furnishes the pattern upon which many of our legal principles have been formed, and an early examination and knowledge of its doctrines cannot be dispensed with, if we would attain to a systematic acquaintance with our own law. It would be easy, by quoting instances, to establish the truth of this assertion; but the careful student of these pages will easily and more advantageously ascertain and verify its truth for himself.

The study of the Roman law resembles the study of the Greek and Roman languages: these languages remain to us, and are conned with diligence as a training for both youth and age, not so much on account of their immediate practical utility, but because of the refining and humanistic elements which they contain. The study of the Roman law is growing in importance, as is evident from the increased attention bestowed upon it in England, in Scotland, in France, and in America. In all these countries it is beginning to be regarded as the true basis for juridical knowledge.

Why, however, should the Roman Law be treated institutionally? Why should there be elementary explanations of its principles and doctrines? Why not begin with the details of the Civil law, and boldly advance to the study of the Pandects at once? And, indeed, the Institutes of the Roman law have been regarded by some as superfluous. Such an erroneous opinion, however, is to be strongly deprecated. The study of the Institutes is indispensable to the proper study of the Pandects. It is extremely difficult to

understand them without some previous preparation. The number of details in the Pandects cannot be compassed and mastered without a knowledge of elementary institutional principles. The Romans themselves were fully convinced of this, and hence they had the maxim "*bonus institutionista, bonus pandectista.*"

When the Roman Law attained its greatest perfection, Gaius, who flourished at the time of the Antonines, wrote his Institutes, for primary instruction in the law; whilst at various periods the most renowned jurists wrote *libri regularum*, and commentaries upon the edicts of the prætors, which were essentially institutional treatises. At Rome, and later at Constantinople, instruction was given to the rising jurists of the nation, and it was part of the plan of instruction, that the Institutes of Gaius should be diligently examined during the first year of the student's course. Later still, Justinian caused a legal compendium for the instruction of the Roman youth to be made upon the plan, and often in the very words, of Gaius, admitting only such changes as the altered state of the law required. This method of preliminary legal instruction has ever since been recognised as the best course to pursue in modern Europe.

What then is the principal distinction between the Institutes of the Roman law and the Pandects themselves? The Institutes present the elements, they draw with freedom the bold broad outlines of the Roman system of jurisprudence. The Pandects minutely fill in these details. This is the principal distinction, but it is not the only one. In the Institutes we are confined to the study of the legislation of Justinian—to the Roman law as it was left by the Emperor,

without any reference to its modern application. In the study of the Pandects, at least as it is at present pursued in Europe and the United States of America, we regard the "*usus modernus juris Romani*," the alterations introduced into the civil law by means of the canon law, and the laws of the Germanic Empire. In a word, the Institutes treat of the pure Justinian law, without any of the modern alterations, whilst in the study of the Pandects we are obliged to regard the civil law, in its present application, in those lands where it is received; and hence we are compelled to take notice of those modifications that have been made in the Roman law during the lapse of several centuries.

The great fault that pervades most institutional treatises on the Roman law, at least those published in Germany, is that they give so much that does not belong properly to an institutional treatise. Thus the able and profound work of Puchta, goes into the Roman law in its details, and is by no means suited to those who wish to obtain an elementary knowledge of its first principles. (*c*) So also the work of Schilling, not yet completed, but which will probably extend to five volumes, cannot with any degree of correctness be called a treatise on the Institutes. (*d*) Again, the work by Professor Boecking, of Bonn, (*e*) is essentially a work on the Pandects, and not a treatise on the Institutes. A treatise on the Institutes falls naturally under two principal divisions. In the first part there must be some account given of what may be denominated as

(*c*) Puchta's "Cursus der Institutionen," 5th edit., Leipzig, 1856.

(*d*) Schilling, "Lehrbuch für Institutionen und Geschichte d. röm. Privatr," vol. i, Leipzig, 1834; vol. ii, 1837; vol. iii, 1846.

(*e*) Boecking, "Institutionen, Ein Lehrb. des röm. Privatrechts," vol. i, Bonn, 1843.

"external legal history"—that is, of the sources of the Roman law itself. And in the second part there must be given a dogmatic explanation of the law. This is the plan which it is proposed to follow in this work. In examining the sources of the Roman law, and endeavouring to ascertain its external history, it will be convenient to divide this history into three distinct periods; the first period extending to the time of the Emperor Justinian; the second treating of the time of Justinian and the "corpus juris civilis;" and the third period presenting the fate of the Roman Law, after the legislation of Justinian, both in the eastern and the western empire. This plan will exclude the discussion of those important primary notions which properly belong to the department of Jurisprudence—Discussions concerning Rights, Duties and Obligations —the State—the *jus publicum* and the *jus privatum*, and other collateral topics. These topics, although of the first importance, do not properly belong to a treatise on the Institutes of the Roman law.

PART FIRST.

SOURCES OF THE ROMAN LAW.

CHAPTER FIRST.

THE EXTERNAL HISTORY OF THE ROMAN LAW TILL THE TIME OF JUSTINIAN.

SECTION I.—*The Elements of the Roman Law, and the Organs from which they proceeded.*

I. THE ELEMENTS OF THE ROMAN LAW. Rights, according to the Roman law, arise from *two* sources, namely, the *jus civile* and the *jus gentium*. The *jus civile* is that source which was peculiar to the Roman people themselves; it was the strictly national law, and arose out of the national character. Justinian clearly expresses this in the following words: "Jus autem civile vel gentium ita dividitur . . . . nam quod quisque populus ipse sibi jus constituit, id ipsius civitatis proprium est, vocaturque JUS CIVILE, quasi jus proprium ipsius civitatis." (*a*)

Source of rights.

The *jus gentium* is that law which is common to all civilized nations; or, as Gaius expresses it, "quod

(a) Instit. Jus. lib. I, tit. ii, sec. 1; see also sec. 2 of the same book and title.

vero naturalis ratio inter omnes homines constituit, id apud omnes populos peræque custoditur vocaturque JUS GENTIUM, quasi quo jure omnes gentes utuntur." (*b*). This is the *jus gentium* of the Romans, which at an earlier or a later period enters and modifies the strictly national law of every civilized people. Justinian keeps this distinction between *jus civile* and *jus gentium* clearly in view when he states that every community governed by laws and customs uses partly its own law, *partly laws common to all mankind:* "Omnes populi qui legibus et moribus reguntur, partim suo proprio, *partim communi omnium hominum jure utuntur.*" (*c*). The *jus gentium* of the Romans is not to be confounded with the *jus inter gentes*, as it is called by a comparatively modern writer, (*d*) or with what Bentham aptly designates "international law;" nor is it to be confounded with that law of Reason or Natural law which is the result of mere speculation—this *a priori* law is not the *jus gentium* of the Romans. The *jus gentium* of the Romans arose from experience and was *a posteriore*, and it might be designated as *empirical natural law. A priori* law, as such, can be of no practical importance, at least to the jurist.

Jus gentium not to be confounded with jus inter gentes

Two elements in Roman law.

Thus we see that there were *two* principal elements in the Roman jurisprudence—the *national* element and the *universal* element. An important question may be suggested—namely, how did the *jus gentium* become an element of the Roman law? In reply, it may be observed that this union of the two elements was not coeval with the origin of the Roman law itself, and, speaking approximately, it may be affirmed that for five hundred years the Romans rejected the introduction

(*b*) Gaius Inst. I, i.
(*c*) Just. Inst., bk. I, tit. ii, sec. 1.
(*d*) This expression was first used by Zouch in the Jus feciale, 1650.

of all foreign law, and confined themselves strictly and exclusively to their own stern national jurisprudence. In the course of the sixth century from the foundation of the state, it was discovered that the national law—the *jus civile*—no longer sufficed for the growing necessities of the nation. Rome had extended vastly beyond the limits originally placed, and its commerce had given birth to wants, and had constituted relations of which its early denizens could have had no anticipation. Under these circumstances it was that the prætors first put forth their edicts, and by means of the *jus prætorum*, or, as it was called, the *jus honorarium*, the *jus gentium* was introduced. Justinian observes "Prætorum quoque edicta non modicum juris obtinent auctoritatem. Hoc etiam jus honorarium solemus appellare, quod qui honorem gerunt, id est magistratus, auctoritatem huic juri dederunt. (*e*) It is not to be supposed that the edicts of the prætors abrogated the *jus civile* by the introduction of legal principles in accordance with the *jus gentium*. This was by no means the effect of the edict, nor did the prætors possess any such power. The result of the introduction of the *jus gentium* was that a new institution grew up by the side of the *jus civile*, an institution of a freer and a more genial character, but far more limited in the sphere of its operations.

In this way the *jus gentium* became an integral part of the Roman jurisprudence; not that the *jus civile* was superseded or even limited, but that an entirely new legal institution was introduced and ran parallel by its side. The effect is that in the whole domain of Roman law there is a *dualismus:* on the one side there is

(*e*) Jus. Inst., bk. I, tit. ii, sec. 7.

the *jus civile* and on the other the *jus gentium*. And as the former had prevailed as the only system of jurisprudence for five hundred years, so the *jus gentium* commenced to run parallel with it as a distinct institution for another prolonged period of about the same duration. For five hundred years the *jus civile* and the *jus gentium* prevailed as active and distinct legal institutions.

Meaning of the term *naturale*.

The term *naturale* was applied to this new institution in opposition to the expression *civile*, and the new principles of the *jus gentium* were found operative in every department of Roman jurisprudence. Thus in the case of property or ownership, originally there existed only one species of ownership—that which was given by the *jus civile*. In the sixth century of the state there arose by the side of this an entirely new mode of holding property—by *natural*, or as it was technically called *bonitarian* ownership, as distinct from the ownership of the *jus civile*, which was called *quiritarian*. The requisites to give a person a title under *bonitarian* ownership were fewer, but the scope of the institution was far more limited than that of the civil or *quiritarian* ownership. Again, in the Law of Inheritance, the *hereditas* might be possessed according to the rules and principles of the *jus civile;* or the *bonorum possessio* was given by the prætor in accordance with the principles of the *jus gentium*. The former principle admitted only the *agnate* relations (a term presently to be explained), the latter principle admitting a much larger class, called the *cognati*.

Examples.

Dominium bonitarium et ex jure Quiritium.

So, also, in regard to the Law of Legacies, there were the legacies which were left according to the strict principles of the *jus civile* and others called *fidei-commissa*, according to the *jus gentium*. Ulpian

defines this species of legacy when he says "Fidei commissum est, quod *non civilibus verbis* sed *precative* relinquitur, *nec ex rigore juris civilis* proficiscitur, sed ex voluntate datur relinquentis." (*f*) Thus, also, similar changes were introduced by the prætors, proceeding in the spirit of the *jus gentium*, in other departments of the law. For the first five hundred years then of the nation's existence the *jus civile* alone prevailed; for the second five hundred years of its existence the prætorian law, based upon the *jus gentium*, prevailed by the side of the old *jus civile*, and this singular peculiarity lasted till the time of the Emperor Constantine.

Change in the time of Constantine.

It was not till the time of Constantine that this *dualismus* was first invaded, when what is called an *exequatur* took place, that is, the two systems were melted together, and a new system was formed from the combination, having the following peculiarity. Regarded *materially* and actually, the element derived from the *jus gentium* had the preponderance; whilst *formally*, the element derived from the *jus civile* prevailed. This peculiarity lasted for upwards of two hundred years, from the reign of Constantine till that of Justinian, when the *material* triumph of the *jus gentium* over the *jus civile* was completed. The result is that in the later Roman law, there is only one species of ownership, namely *quiritarian*, and the party claiming property had a title by *quiritarian* ownership, or he had no legal holding at all. But on the other hand, the *material* requisites for this ownership were those which were required for *bonitarian* ownership. It was the *jus naturale* as contra-distinguished from the *jus civile* that

(*f*) Ulp., frag. xxv, 1.

decided the right; whilst the ownership was only *formally* quiritarian.

The above remarks will also apply equally to the *bonorum possessio*, *formally* in relation to the *hereditas*, the principles of the *jus civile* only prevailed; but the *material* requisites were those demanded for the *bonorum possessio*. In a word, in the *exequatur* thus introduced, for all that was *formal* the *jus civile* remained, but *materially* the *jus gentium*. It was in this way that the *universal* element acquired the predominance, and it was by this means that the Roman law has become in a certain sense an universal law for all times and for all people.

Tripartite division of the Roman law to be rejected.

In one of the titles to the Institutes we find not only the expressions *jus civile* and *jus gentium*, but also the phrase *jus naturale* mentioned as a *third* element in the Roman law. These elements are here said to be *tripartite*. —"*Dicendum est igitur de jure privato, quod tripertitum est.* Collectum est enim ex *naturalibus præceptis*, aut *gentium*, aut *civilibus*." (*g*) In the next section Justinian proceeds to a definition of the *jus naturale*.— "Jus naturale est, *quod natura omnia animalia docuit.* Nam jus istud non humani generis proprium est, sed omnium animalium, quæ in cœlo, quæ in terra, quæ in mari nascuntur. Hinc descendit maris atque feminæ conjunctio, quam nos matrimonium appellamus, hinc liberorum procreatio et educatio." (*h*)

The description of natural law which is here taken from Ulpian (*i*) must be considered as a mere play upon the word law, and has no jural importance. If we enquire what is the distinction between the *jus gentium* and the *jus naturale*, we shall by no means find

(*g*) Sec. 4, Jus., 1, i, de just et jure. (*h*) Pr. et sec. 1, Jus. I, ii de jure nat. (*i*) L. 1, D. (1, 1).

it easy to give a definite answer—*jus naturale est, quod natura omnia animalia docuit.* As an illustration, Ulpian refers to matrimony, the relation of the sexes, and the nurture of children. To these relations in the instincts of animals, there is merely something that is analogous and nothing more. But what is the *jus gentium*—that "quod vero naturalis ratio inter omnes homines constituit" or that "quasi quo jure omnes gentes utuntur" as Gaius names it? (*j*) Is not that which man is said to have in common with animals—marriage, the nurture of children, &c., found with all civilized people? It is only indeed allegorically that the *jus naturale* can be regarded as a third division; or at the most it can only be treated as a subdivision of the *jus gentium;* it cannot with anything like strictness be given as a *third* element. But even this distinction is worthless, as animals cannot have the idea of *right.* The idea contained in the word *jus* is not applicable to them in any sense. So that setting aside the fancied *jus naturale* as a separate element, there will remain for our consideration only the two already mentioned—the *jus civile* and the *jus gentium.*

II. We now turn to the ORGANS OF LEGAL RIGHTS—or, as we may term them, the *factors* from which Rights spring. And these are twofold—*jus scriptum* and *jus non scriptum.* When, however, we make this division it is simply in accordance with the Organ by which Rights are originated. "Constat autem jus nostrum aut *ex scripto*, aut *ex non scripto*, ut apud, Græcos τῶν νόμων οἱ μεν ἔγγραφοι οἱ δὲ ἄγραφοι. (*k*)

Jus scriptum and jus non scriptum.

1. The term *jus scriptum* must not be taken in a grammatical sense, but rather as indicating those

Jus scriptum.

(*j*) Gaius, I, i.

(*k*) Sec. 3, Jus. I, 2, de jur. nat.

Rights which arise from actual legislation. It is to be applied to that law which proceeds from the legislative power or authority in the state. Usually in ancient times such laws were communicated to the people by writings on tablets of metal or stone, or other hard and durable material.

Jus non scriptum.

The *Jus non scriptum* is that law which arises immediately out of the life of the people themselves, without the authority of the legislative power, and is confirmed by use and by the length of time that it has endured. As Ulpian observes, "Ex *non scripto* jus venit, quod *usus* comprobavit. Nam diuturni mores, consensu utentium comprobati, legem imitantur." (*l*) And Julianus again in the same spirit says "*Inveterata consuetudo pro lege non immerito custoditur*, et hoc est jus, quod dicitur moribus constitutum." (*m*) This *inveterata consuetudo*, or law by custom, is thus characterized by two peculiarities—the one of which is *negative*, the other *positive*. It has *not* a legislative origin; but it is rooted in the spirit of the people, and is instinctively introduced into their life. But this alone is not enough, for it must be perfected by long continuance and by use.

It may, perhaps, be asked, which organ has the higher claim to regard and authority, the *jus scriptum* or the *jus non scriptum?* And to this question it must be replied that they are of equal authority, for both proceed from the same original source—both, so to speak, flow out of the mind of the nation. Whether a law proceed from the national consciousness, or is the result of a positive act of the legislative power, makes no essential difference. In the infancy of a state there is no legislative

(*l*) Ins. Jus., lib. I, ii, sec. 9.

(*m*) L. 32, sec. 1, Dig. (1, 3) ed legibus senatusque, &c.

authority, and long before such an authority exists, national necessities and instincts give rise to customary law. It is when the state advances towards maturity, that the legislative power obtains and increases its activity. We perceive, then, that as to rank and authority, the *jus scriptum* and the *jus non scriptum* are equal; whilst the latter is the earlier in its historical development.

In modern jurisprudence, customary laws only of a special character and possessing limited scope, can arise: as, for example, the *lex mercatoria*, and customs in certain districts: but a customary law for the whole state can now no longer be formed.

Subdivisions of the jus scriptum.

2. The *jus non scriptum* admits of no subdivisions. It is however quite different with the *jus scriptum*. As there were several distinct organs of legislation in the Roman state, so there necessarily arose several subdivisions of the *jus scriptum*. These divisions are the following: LEGES, *per eminentiam*, PLEBISCITA, SENATUS-CONSULTA CONSTITUTIONES PRINCIPUM, EDICTA MAGISTRATUUM, and RESPONSA PRUDENTIUM. Both Gaius and Justinian, who follows him almost *verbatim*, agree in this enumeration of the sources of the *jus scriptum*. Gaius says, "Constant autem jura ex legibus, plebiscitis, senatus consultis, constitutionibus principum, edictis eorum qui jus edicendi habent, responsis prudentium." (*n*)

Leges, *per eminentiam*, which were made either in the *comitia curiata*, or the *comitia centuriata*.

Plebiscita, these were laws made by the *plebs*, which laws were held originally not to bind the *patricii*. Both

(*n*) Gaius, bk. I. sec. 2. See also Inst. Jus. bk. I. tit. ii. sec 3. and Cic. Topica, c. 5.

leges and *plebiscita* were laws proceeding from the *populus* or people.

Senatus-consulta were those laws which proceeded from the *Senate.*

Edicta magistratum, these were the edicts of the higher magistrates, that is of the "*magistratus populi Romani.*"

Responsa prudentium, a phrase applied to the answers of the juris-consults, which, in a certain sense, had legislative authority. It is necessary to examine all these organs of legislation with care and in detail.

TITLE FIRST.

Of the Popular Legislation—Leges and Plebiscita.

Section II.—*Historical explanations.*

Historical explanations.

We shall first proceed to a brief historical examination, in order to determine the development of the *leges* and *plebiscita.*

For a period of fully eight hundred years the complete and unbroken power of legislation resided in the hands of the Roman populus. Such was the case, not merely under the kings in the early times of Rome and during the period of the Republic, but also under the emperors themselves, at least, theoretically till the time of Constantine, in the third century of the Christian era. Actually and practically this legisla-

tive power was possessed and retained by the people not later than the reign of the Emperor Claudius, A.D. 41—54. This power was exercised, as will be seen, at one time in the *comitia curiata*, at another in the *comitia centuriata* and the *tributa*, and at other periods by modes and forms varying from those which prevailed in these ancient institutions.

Leges Curiatæ.

1. In the earliest times of the kings *leges curiatæ* were made by the Roman people by means of their decisions in the *comitia curiata*. It must, however, be observed that by the *populus Romanus* of these early times we are only to understand the *patres*, as these alone were entitled to enter and vote in the *comitia curiata*. Not that it is to be supposed that these *patres* were nobles; they were the citizens in the strict sense of the word. Distinct from the *patres* were the *plebs*, who did not possess the rights of citizenship, and who had no vote in the *comitia curiata*. This has been doubted by some writers, as by Niebuhr (*a*); but the better opinion seems to be that the *suffragium* was confined to the *patres*. Whether the vote was taken *viritim*, that is, whether each single vote was counted, or whether the votes were taken according to the *genera*—the family or the stock, has also been questioned; but the latter appears to have been the case. A passage from Aulus Gellius' "Noctes Attici" seems to decide this point. He says: "*quum ex generibus hominum suffragium feratur* curiata comitia esse, quum ex censu et ætate centuriata, quum ex regionibus et locis, tributa." (*b*) So that if sixteen out of the thirty *curiæ* voted for a law, the statute passed, without regard to the number of individual votes.

(*a*) See Niebuhr Hist. vol. I. (*b*) Gellius, N. A. bk. 15. cap. 27.

Origin of the Roman Government.

In tracing the earliest history of the Roman law we find that the government in Rome was originally composed of a mixture of different national elements. The ancient city was peopled by a race of Pelasgic origin. The original inhabitants were overcome by the Sacrani, a people whom Virgil makes to inhabit the city of Latium. In the old Italian manner, a colony had been founded, which through Romulus now became the germ of an independent state. By the union of this people with the Sabines, this ancient Rome was compacted, and consisted of two distinct stems, the Romans and the Quirites. (*c*) These two constituent elements possessed equal rights and authority in the infant state. Under Romulus however, another stem was added to the growing sapling, by the union of an Etruscan people, the monuments of whose civilization even at that early period may be seen in the vases preserved both at Munich and at Rome. (*d*) Thus the community grew up from three principle elements, stems, or tribes: namely, the Ramnes, the Titienses, and the Lucerenses, and to these three tribes the local divisions of the city and the neighbourhood corresponded. (*e*)

The three tribes were subdivided into ten *curiæ* each, and this partition into thirty *curiæ* was the most ancient division of the Roman people. The term *lex curiata* was applied to the law made by the people in the assembly of the *curiæ*.

(*c*) Festus v. Quirites, dicit.

(*d*) Varro de ling, lat. V. 46 ed Mueller, idem op. Serv. ad Aen. V. 560. Diony. II. 36. 37. Festus v. Callius mons.

(*e*) Varro de ling. lat. V. 55. Cic. de reipubl. II. 8. Livius 1. 13. X. 6. Dionys. IV. 14. Plutarch. Romulus, 20. Festus v. Lucerenses, Lucomedi, Titienses. It is to be observed that Dionysius gives the division into three tribes, but does not mention their names. See also Walter's "Romische Rechtsgeschichte," vol. I. pp. 10. 11. 2nd edit.

The reform under Servius Tullius.

2. The first great reform that took place in the Roman constitution is supposed to have occurred in the reign of Servius Tullius and is known by the name of the "Servian Reform." This reform consisted in calling the plebs to the rights of citizenship, which till this period had been alone enjoyed by the *patres*, thus extending the suffrage to the whole Roman people. A new popular assembly was created by this organic change, called the *comitia centuriata* or, as Cicero informs us from the laws of the Twelve Tables, the "*comitiatus maximus*." The causes which led to this important and beneficial change in the Roman constitution, and its details must be sought for in the political history of Rome. In the altered government, we see the wisdom of these early reformers manifested by their efforts to give to every member of the commonwealth the rights of citizenship and the corresponding suffrage.

Comitia Centuriata.

The Census.

The peculiarity of the new system was—and we have attained to nothing as perfect in modern times—that the vote was valued according to the position that the party occupied in the *census*. In other words, its value varied according to the proportion of the burdens of the state which the voter himself sustained. There were *five* distinct classes in the census. It is well to remember this; as in some important legal transactions, for example in *mancipatio*, which was a solemn form of conveyance of those who were under the *potestas* of another, and in the making of a testament *per aes et libram* the "*quinque testibus civibus Romanis puberibus*" as representatives of the five classes of Roman citizens, played a most important part. (*f*)

These five representative classes in the Roman

(*f*) See Gaius, bk. I. secs. 113. 119; also bk. II. sec. 101.

state, were arranged, if we are to trust Livius and Dionysius, according to the amount at which they were assessed in the census. These several amounts were 100,000, 75,000, 50,000, 25,000, and, according to Boech's convincing conjecture, 10,000 Ases.

This valuation, however, was not made according to the standard of the As in the old time, when its weight was an actual pound of copper, but according to the weight of the As in the sixth century of the state. The original proportions were, 20,000, 15,000, 10,000, 5,000, 2,000. (*g*)

For military purposes these classes were subdivided into two divisions, the aged and the young, whilst each division contained a certain number of houses or *centuries*. The first class contained eighty of these centuries, the second, third and fourth contained twenty each, and the fifth class thirty. The higher the class, the fewer the number of the persons contained in each of these centuries, whilst the lower classes would of course contain a much greater number of persons. Each of the citizens had a vote, but the value of the vote was regulated by the position the voter held in the census. The *proletarii* or poorer inhabitants of the state were freed from taxation, and served the state according to Livius by their children. "*Proletarii dicti sunt plebei qui nihil reipublicæ exhibeant, sed tantum prolem sufficiant.*" (*h*) Such then was the constitution of the Roman state, as it was found in the *second* century of its existence after the completion of the Servian reform. The *patres* under this arrangement,

(*g*) Livius I. 43. Dionys. IV. 16. See also Walter's "Recht's Geschichte," vol. II. pp. 32. 33.

(*h*) Dionys. IV. 18. 19. VII. 59. Livius III. 3. See also Gneist "Syntagma," Leipsiae, 1858, pp. xii. xiii. duodecim tabularum fragmenta.

were in the first class, and although this gave rise to no real legal distinction, it was productive of the most important results.

Mode of legislating in the Comitia Centuriata.

The rules which obtained in the *comitia centuriata* were peculiar. A *lex* when once introduced into this assembly must be adopted without any amendment, or wholly rejected. It could not be modified or adapted to meet the wishes of the *comitia*. Hence it is manifest that the entire legislation was in the hands of the magistrates who had what was designated the "*jus agendi*," or the right of introducing to the *centuriata* a motion for a new law. Thus the people by the Servian reform obtained merely the *suffragium*, they had not the *jus honorem*, they could not introduce a law, or as it was technically expressed "*legem ferre*" which shews the great extent to which their rights were limited. In order that the law should be valid, the *patres* must "*auctores fieri.*" Both Livius and Dionysius agree in stating that the law must be "*auctoritate patruum*"—it must be approved by the Senate. Niebuhr thinks that to be binding it must also have received the approval of the *centuriata*. In addition to this there must have been the ratification of the *patres*, signified either by a senatus-consultum or in some other way.

It is worthy of note, that in connection with the part taken by the *patres* in the passing of a law, the words *auctores*, *auctoritatem*, &c., are invariably employed. It will be hereafter frequently seen that words formed from the root *aug* play an important part in Roman law, and that such words are always used to indicate an *additive* or completing character, showing, so to speak, that a gap had to be filled up. As instances of this fact take the case of *existimatio*, which is

said to be effected *ex auctoritate legum;* of the *tutela;* and that of the *auctoritas patruum.*

Authority of the patres.

We may sum up what has been said as to the *patres* by observing, that as the richest men in the Roman state they were numbered in the first class in the census, thus placing the highest value upon the *suffragium* they enjoyed; to them belonged exclusively the privilege of the *jus agendi*; and lastly, a law could not be valid if they refused to give to it the impress of their *auctoritas.*

Struggles of the plebs.

3. It was not possible that a growing and an ambitious people would long submit to such an imperfect exercise of the rights of citizenship. It is certain that the genius of the Roman people was hostile to any limitation being placed by dominant wealth and authority on the fullest exercise of their freedom—a freedom which they jealously nursed and guarded for nearly a thousand years, until it became corrupted by luxury, and trampled out by despotism. Hence there arose fierce struggles between the *patres* and the plebs. These conflicts are always interesting as a study, for they enable us not only to trace the development of the jurisprudence of Rome, but they also present to us many a lesson of political foresight and sagacity. In these struggles for power, or rather for freedom, on the part of the *plebs*, their influence was constantly on the increase, whilst the authority of the prætors, the power of the consuls, and that of the dictators, were always derived from the popular will.

Increase of their power.

In the 415th year of the state the struggle of the *plebs* against the *patres* became entirely successful; the *patres* being deprived of the power of refusing their assent to the *lex centuriata.* Indeed, by a legal fiction

the *auctoritas patruum* was supposed to have been given to the *lex*, from its very inception. Thus the imposition of the *auctoritas* became an empty form. The effect of thus *compelling* the *patres*, "*auctoritatem fieri*" soon led to more important results. To assume in every instance the exercise of the *auctoritas* of the *patres* was equivalent to an assumption of the power through which it had been enjoyed. It was as though the *plebs* had by a forcible, a resolute, and a firm hand, seized upon the honours of the magistracy; and this in point of fact was the case. (*i*) But still more important consequences followed the determined struggle of the masses. The decisions of the plebs in the *comitia tributa* were held to bind the entire *populus*, a term which Gaius informs us included the "*universi cives*"—the patricians and the plebs. (*j*) This is the meaning of the lex Horatia or Valeria mentioned by Livius, "ut quod plebs tributim jussisset populum teneret." (*k*) This law, which decided that a *plebiscita* should bind the whole body of the *populus*, established as early as the 4th century of the state (about the 305th year of Rome) completed the supremacy of the plebs. The decision, we shall see, was ratified subsequently in the most authoritative manner. But the acknowledgement of a principle, and its firm practical establishment are two very different things: and as indicated above, it was not till the 415th year of Rome, that by a second recognition it was placed beyond all doubt that a *plebiscita* should bind the *universi cives* as a valid and operative law. The crowning triumph of all was the *third* confirmation

(*i*) Livius, bk. VIII. c. 12. Compare bk. I. c. 17.

(*j*) Gaius, I. sec. 2.

(*k*) Livius, III. 55. Dion. Flal. 11. 54.

of the principle which took place by the passing of the *lex Hortensia* in the 468th year of the state.

Lex Hortensia.

The student of English constitutional history will not fail to mark the similarity of these struggles of the Roman people, to those of our ancestors in the obtaining of our own Magna Charta. Gaius informs us as to the effect of this *lex Hortensia*. "Sed postea lex Hortensia lata est, qua cautum est ut plebiscita universum populum tenerent: itaque eo modo legibus exæquata sunt. (*l*) It was to this lex Hortensia that the Roman jurists always looked, when they wished to find a firm foundation for the legal authority of the plebiscita.

Exequatio of the plebiscita.

The *plebiscita* were not essentially laws, and hence Cicero makes the well-known distinction of *leges*, *plebiscita* and *senatus-consulta*. But, although they were not essentially laws, they were, as Gaius observes, "*legibus exequata;*" by the *lex Hortensia* they were as binding as the *leges*, strictly so called, and the *plebiscita* were ever afterwards regarded as such. Hence the *lex Cincia* and the *lex Falcidia* are always called laws though they were really *plebiscita*. In the subsequent legislation of Rome, the richest source of the reforms in its jurisprudence are due to the *plebiscita*. The *lex curiata* and the *lex centuriata*, were in this respect far inferior in importance, and in the beneficial changes that resulted from the action of these legislative institutions. We have thus traced the history of the Roman constitution; first as it was developed in the institution known as the *comitia curiata*, in which the leges were made by the *patres* and by them alone; —secondly, in the institution of the *comitiatus maximus*,

(*l*) Gaius, bk. I. sec. 3.

so called because all the citizens were allowed the exercise of the suffrage in the *comitia centuriata*, according to the regulations of the census; thirdly, the inchoate constitution which was gained by the aspirations and struggles of the *plebs* after freedom, and their final triumph upon the *plebiscita* obtaining the authority of law. One additional observation shall close this title.

Rights of the plebs under the emperors.

4. It is a remark that has often been made, that when the republic fell, the entire legislative rights of the people were extinguished. Such an opinion is entirely erroneous. Under the first emperors, the constitution, as far as legislation was concerned, still retained the old republican form. For example, under Augustus the celebrated "*lex Julia et Papia Poppæa*," a law against celibacy, was passed by the *populus*: so under the Emperor Tiberius, a popular law, entitled the "*lex Junia Norbana*," was enacted, to regulate the manumission of slaves: again in the reign of Trajan, a law with a most extraordinary name entitled "*lex Vectibulici*," (*m*) as it appears in all the MSS., was enacted. These instances will be sufficient to prove that when the emperors vaulted to power, the nation did not immediately become an absolute monarchy. It was long before freedom was finally extinguished. At last, however, the power of the people was practically diminished to a mere form, and the *senatus-consulta* usurped the place of the ancient laws of the people.

(*m*) l. 3. Cod. de Servis reipub. 7. 9.

SECTION III.—*The mode of procedure in the popular legislature.*

Lex satura.

There were certain terms and principles observed in the Roman *comitia* which it is necessary now briefly to explain.

1. A most important rule of legislation was, that there must not be different objects combined by amendment or otherwise in the same law, or, as it was expressed, the law must not be proposed to the people *per saturam*. When the law was proposed to the people (*lex fertur*), it, as we have already noticed, was simply received and adopted or rejected. There could be no alteration by amendment in the form, as in our modern legislation, so as to make it a *lex satura*, and no debate or discussion was allowed over its subject matter or contents. Moreover, to render legislation clear and simple, the Roman method demanded that things substantially different should be brought forward for distinct and separate enactment.

In the *lex Julia et Papia Poppœa* and the *lex Julia Augusti de adulteriis*, a number of points are introduced, but it cannot be said that either *lex* is *per saturam nata*. (*a*) Again, the phrase *legis promulgatio* was employed by the Romans not for the publication of a law, as with us, but by *legem promulgare* was meant the making of the law known previous to its acceptance or rejection in the *comitia*.

Legis promulgatio.

(*a*) See also the lex Cæcilia et Didia made in the year of Rome, 656. Cic. Orat. pro domo c. 20. Also Festus verb. sign. Satura; Isodorus 5. 16; and also for Satura see l. 1. Cod. Theod. 2. 18. For further explanations see Puchta's Institutionen, vol. I. pp. 289. 290. 5th edit.

Whilst no discussion was allowed in the *comitia*, it would be erroneous to suppose that the law was not submitted to careful and earnest debate. An assembly of the people was held, called the *concio*, in which the proposal for a new law made by the magistrate was submitted to discussion, and speeches were made for and against the law which was about to be submitted to the decision of the *comitia*. Hence we find such phrases in Cicero as *concionem advocare*, or *vocare*, and *habere concionem* for the calling together and the addressing of this assembly of the people. In the comitia a simple affirmation was made by the citizen who was in favour of the law, and this was expressed by formal words. When the moment for the division came, upon the word *discedite* being pronounced, the people divided according to their tribes, and upon the law being put, those who were in favour of it uttered the words "*uti rogas*" which may be expressed in a periphrasis—"let the law be as you propose;" whilst the persons opposed pronounced the word "*antiquo*" which may similarly be explained as meaning, "I abide by the old law." This was the mode of proceeding which lasted for centuries, till in the later period of the Republic, the *lex Papiria de tabellaria*, passed A.U.C. 623, enacted that the votes of the people should be taken by means of writing. The method employed was by employing tablets, or tickets, the party marking the affirmative with the words *uti rogas*, and the negative with the word *antiquo* or simply the letter *A*. (*b*)

The Concio.

Mode of taking the vote in the Comitia.

If the law was approved and secured the suffrage of the people it was technically said to be *lex perlata*,

(*b*) The principal authority for these leges tabelaria is Cic. de lege iii. 16.

which is to be distinguished from *lex lata*, a phrase applied to a law upon its proposal to the people. The *lex* when it had finally passed the popular assembly was engraved usually upon brass, but sometimes upon stone, and upon its publication was binding upon the whole people.

Lex perfecta, minus perfecta, and imperfecta.

2. Concerning this division of *lex* we have an interesting fragment of Ulpian's but unfortunately it is only a fragment. The fragment as we have it runs as follows: " . . . . . prohibet, exceptes quibusdam cognatis, et si plus donatum sit, non rescindit. 2. Minus quam perfecta lex est quæ vetat aliquid fieri, et si factum sit non rescindit, sed pœnam injungit ei qui contra legem fecit; qualis est lex Furia testamentaria, quæ plus quam mille asinum legatum mortive causa prohibit capere prætor exceptas personas, et adversus eum qui plus ceperit, quadrupli pœnam constituit." (*c*) Cujacius has proposed to supply the *lacuna* in Sec. 1. as follows:— *Imperfecta lex est, veluti Cincia, quæ supra certum modum donari* prohibet. Shultingius and Savignius both approve of his conjecture. In another place, however, Cujacius endeavours more fully to complete the fragment; which he does in the following words—" *Lex aut perfecta est, aut imperfecta aut minus quam perfecta. Perfecta lex est, veluti Ælia Sentia, quæ vetat aliquid fieri et si factum sit, rescindit. Imperfecta lex est, veluti Cincia, quæ supra certum modum donari prohibet.*" (*d*) F. A. Schilling presents a somewhat different conjecture, which does not, however, differ materially from Cujacius.

The general opinion is that a *lex* is said to be *perfecta* when it contains a *sanctio* in the concluding part,

(*c*) Ulp. Frag. de Legibus et moribus, secs. 1. 2. at the beginning of the *fragmenta*.

(*d*) Cuj. Observ. xix. 30.

declaring that everything done contrary to the law shall be null and void. In the *lex minus quam perfecta*, a transaction done in violation of it does not lose its validity, but the party found transgressing exposes himself to punishment. The *lex* is said to be *imperfecta* when neither the one nor the other of the above peculiarities exist, or as it may be expressed when the law has no *sanctio*.

Our notion in regard to the lex imperfecta is not quite clear. It would seem, that having no *sanctio*, it could have no *direct* legal operation; but that it merely tendered good advice or council. It would however be incorrect to suppose, that such *leges imperfectæ* were entirely inoperative. The effect of such laws it would appear was, that although not absolutely binding, and hence not strictly laws they presented the outlines of rules, which it was the duty of the magistrate to take into his consideration. The prætor dare not, in his edict, neglect the principle embodied in the rule. For example, the *lex Cincia* over *donatio* is a *lex imperfecta*, for it has no sanctio. It simply enacts that no *donatio* was to be made above a certain amount, yet no punishment is added for the violation of the rule. Still, by the edict of the prætor it was ordained that the *donatio* might be repelled by an *exceptio*, the nature of which will be hereafter explained—the *exceptio legis Cincia* or by a *replicatio* out of the *lex Cincia*, as the case might be. Care then must be taken to avoid the error of some jurists, who have supposed that the *lex imperfecta* was inoperative, and that it possessed none of the characteristics of a true law. It is certain that no opinion could be more erroneous. (*e*)

(*e*) See Puchta's Institutionen, vol. II. p. 385. also note cc. same page.

Names given to popular leges.

As to the naming of the laws made in the popular legislature, the general rule was, that these laws took the names of the legislators who had prepared them, or of the two consuls. Thus we frequently find laws deriving their names from the consuls, as well as from the tribunes of the people. When one of the consuls introduced a law, this law took the name of the other also:—for example, the *lex Ælia Sentia*, the *lex Junia Norbana*, and the *lex Papia Poppæa* have double names from the two consuls, during whose consulates they were promulged.

The plebiscita have only one name, as the *lex Cincia*, a law introduced by a tribune of the people in the year 550 of the state by Marcus Cincius Alimentus, so also the *lex Julia* after Julius Cæsar, the *lex Augusta* after Augustus, and the *lex Cornelia* after the Dictator Cornelius Sulla. Again, we sometimes find a law with a double name and the copula *et*, as the *lex Julia et Papia Poppæa*. This however is not a single law, but one law added to another; the *lex Julia* had added to it at a period a little later, the *lex Papia Poppæa;* similarly we have *lex Julia et Plautia*, the *lex Julia et Titia*. When the copula *et* is found, there are invariably two laws. With the name of the legislator is sometimes found the contents of the law; as the *lex Cornelia testamentaria*, the *lex Cornelia cibaria*, or sometimes a substantive indicating the nature of the law is also added to the name, as *lex Julia de peculatu* or in the genitive case as *lex Julia majestatis*. But as we have said above the usual mode of distinguishing a law, is by mentioning the name of the legislator by whom it was introduced, or the names of the two consuls.

SECTION IV.—*Leges regiæ and Jus papirianum.*

Leges regiæ

The most ancient laws of the Roman people were made through the *rogatio* of their kings. The laws were proposed by the king to the people, and when the populus had passed them in the *comitia curiata*, upon being approved by the senate, they obtained their binding force. This mode of enactment lasted as we have seen till the reign of Servius Tullius when the *comitia centuriata* superseded or rather absorbed the *comitia curiata*. It was to this complex of law passed during the period of the kings that the term *leges regiæ* was applied. The *rex* however it must be remembered in these early times, was not a monarch in our modern sense of the term, but held only the position of a first magistrate.

The *leges regiæ* related for the most part to criminal law, pontifical law, and matters immediately affecting the government of the state. The private law of Rome at this period was derived, if not exclusively, at least principally from the ancient customary law. It is worthy of note that in the infancy of a state acknowledged customs suffice to regulate and decide most questions connected with private right.

Jus papirianum.

These *leges regiæ* were we are informed collected by Papirius, of which fact there can be no doubt, and it is to this collection that the phrase *jus civile papirianum* is applied. There are two sources of information open to us on this interesting point—Dionysius Halicarnassus, (*a*) who gives us a full explanation; and Pomponius in a valuable passage in the Pandects, the

(*a*) Bk. III. c. 36.

whole of which is deserving of our closest attention and study. (*b*) In this passage, which is found in lex ii in the Digest "*de origine juris*," bk. i. tit. 2, Pomponius gives an abridgement of Roman legal history; in sec. 2 of this fragment he mentions this *jus papirianum*, and speaks as though it were extant in his time and still in use. His words are, "Leges quasdam et ipse (*i. e.* Romulus) curiatas ad populum tulit. Tulerunt et sequentes reges, quæ omnes conscriptæ exstant in libro *Sexti Papirii*, qui fuit illis temporibus, quibus Superbus Demarati Corinthii filius, ex principalibus viris. Is liber ut diximus, appellatur *jus civile Papirianum*, non quia Papirius de suo quidquam ibi adjecit, sed quod leges sine ordine latas in unum composuit." In the time of Julius Cæsar, as Paulus informs us, Granius Flaccus wrote a commentary on these *leges regiæ* as collected by Papirius. Paulus says—"Granius Flaccus in libro de jure Papiriano scribit." (*c*) From this it is evident that even in the latter times of the Republic the *jus Papirianum* was deemed to be of importance. The exact period when the *jus civile Papirianum* was compiled is uncertain; that it was long before the period of the twelve tables is well known, but whether it was during the times of the kings or afterwards is not with any certainty ascertained.

Whether Papirius collected the whole of the laws has also been questioned. Dionysius informs us that after the expulsion of the kings, he restored the laws

(*b*) Lex 2, Digest. de origine juris, bk. I. tit. ii., which is usually written l. 2. de orig. jur. D. (I. 2.)

(*c*) L. 144, Dig. de verborum significatione, bk. L. tit. 16. This title and book of the Digest occurs so frequently that it is usual to quote them in abbreviated form as follows: for example, the above extract would be l. 144. V. S. 50. 16., or simply l. 144. V. S., and similarly in other cases.

of Numa. (*d*) Did he, as Pontifex, confine himself to the *jus pontificale* or extend his labours to the whole body of the laws? This is uncertain. Still, Pomponius says: "Et ita *Leges* quasdam et ipse curiatas ad populum tulit; tulerunt et sequentes Reges; quæ *omnes* conscriptæ exstant in libro Papirii." The expression of Pomponius, *omnes leges*, would seem in the opinion of some to indicate that his labours extended to the whole body of Roman jurisprudence extant in his time.

We have several collections of these *leges regiæ*, the best of which is by Dirksen. (*e*) Festus also in his work, "De Verborum significatione," gives many of them.

Tabula Marliani.

For a long time it was thought that these laws were discovered in a pretended relic of antiquity called the *Tabula Marliani*. Marlian was a writer in Italy in the 16th century who endeavoured to restore these *leges regiæ*. The opinion, however, alluded to rested on a misunderstanding of a passage in "Marliani topographia antiquæ Romæ" (1534) in which he gives a number of these old laws—"Erant et leges a Romulo institutæ, quarum argumentum tale est: ne quid inaugurato faciunto, &c." Then, using archaic language he endeavours to present to us examples of these *leges regiæ*, and from this it was conjectured that he had found certain metallic tablets. (*f*) Dirksen has proved that no such *tabulae* could have been found, and that, judging from the contents of his work, Marlian had only made compilations from fragments that were extant in other sources.

(*d*) Diony. III. 16.

(*e*) H. C. Dirksen "Versuch zur Kritik und Auslegung,"—Attempt at criticism and interpretation; the leges regiæ are mentioned at page 204 and following.

(*f*) See Puchta's Institutionen, vol. I. p. 125.

SECTION V.—*Of the Laws of the Twelve Tables.*

Names given to these laws

The laws of the Twelve Tables constitute the principal source of all Roman law. Livy calls this body of legislation the *fons principalis* of the public and private law of Rome; (*a*) and this phrase is especially true when speaking of Roman private law. These laws are quoted by the Roman jurist as "*Lex duodecim tabularum*," or as "*Lex decemviralis*," or simply as "*Lex*" *per eminentiam*, whilst the rules and customs established by them are expressly designated as *Legitima*.

Origin.

1. As to our knowledge of the *origin* of these laws of the twelve tables we are indebted to Livy and to Dion. Halicarnassus, who present us with an interesting account of the struggles out of which they arose.(*b*) Dionysius occupies the whole of his tenth book with matters relating to the Decemvirs. From these accounts it appears that, at the close of the third century of the state, in the 292nd year of Rome, the people demanded a universal written law in the place of the unrevealed mysteries of the *jus pontificale*. He says that there was a clamour followed by a struggle for a more exact national law in the place of the arbitrary decisions of the pontiffs. After eight years of strife, an embassy was sent to Greece, and the Solonic law was imported and received as the form in which the ancient customs of the people were to find their legislative expression. This is so distinctly stated and even insisted upon, that it cannot lightly be rejected. Pomponius informs us that "placuit publica

(*a*) Liv. III. 34.

(*b*) Liv. III. 33 and following, Dion. Hal. bk. X.

auctoritate decem constitui viros, per quos peterentur leges a Græcis civitatibus et civitas fundaretur legibus, quas in tabulas eboreas (roboreas ?) perscriptas pro rostris composuerunt, ut possint leges apertius percipi. Datumque est iis jus eo anno in civitate summum uti leges et corrigerent, si opus esset, et interpretarentur, neque provocatio ab iis, sicut a reliquis magistratibus, fieret. Qui ipsi animadverterunt, aliquid deesse istis primis legibus, ideoque sequenti anno alias duas ad easdem tabulus adjecerunt. Et ita ex accidentia appellatæ sunt leges duodecim tabularum quarum ferendarum auctorem fuisse decemviris Hermodorum quendam Ephesium, exulantem in Italia, quidam retulerunt." (*c*) This embassy, which was sent to Greece in the 300th year of the state, returned after having been absent two years, and in the year 302 A.U.C., organic changes were effected in the government of Rome by the introductions of these new laws. It was not merely a legislative commission, but the decemvirs for the time superseded both the tribunes and the consules. In the first year of their office, these decemvirs presented ten tables of laws to the populus, which were received in the *comitia centuriata*, and approved by the senate. A new revolution, however, broke out, in consequence of the usurpations of these decemviri, and they in their turn were expelled by a tumult of the people. Subsequent to their expulsion, two new tables of laws were received, and approved by the nation, in the 305th year of the state, thus increasing the number from the ten to the twelve tables.

2. The laws of the twelve tables exerted an im- Importance of

(*c*) L. 2. sec. 4, de orig. jur. D. I. 2. Compare also Cic. de rep. II. c. 36. 37 57. III. c. 37. de orat. I. c. 43; Liv. III. c 9. 10. 11. 31. sqq. IV. c. 1-6; Tac. Annal. III. c. 27; Gell. N. A. XX. c. 1; Dion. Hal. X. c. 3. sqq.

the laws of the twelve tables.

mense influence on the jurisprudence of Rome. A mere glance at the Pandects, which were compiled almost a thousand years afterwards, will prove that the Roman jurists constantly refer to, and rest their opinions and decisions upon, the laws of the twelve tables. It may be safely affirmed that before the times of the emperors the principal business of the *veteres juris-consulti* was the interpretation of these laws and the construction of *formulæ*.

It is not unfrequently stated that the law contained in the twelve tables was entirely derived from Hellenic sources, and that these decemviri gave a mere interpretation of the laws of Solon. Such an opinion must be rejected. It is quite possible to become acquainted with and to use the legislation of another people in order to introduce its form and adopt its spirit, without our being bound to a mere servile imitation. The subject matter of the laws of the twelve tables was undoubtedly the native national law of Rome, and it was only to perfect the form of this law, and to find a fit expression for it, that reference was made to the jurisprudence of Greece. Cicero, who was well acquainted with both the laws of Greece and of Rome, says that the Roman law was not to be compared with that of Solon or of Draco; and in an interesting passage he affirms that you might search a library and not find as much wisdom as in the laws of the twelve tables. (*d*) Both Dion. Halicarnassus and Pomponius also assert that the twelve tables contained the national law. (*e*) Not that isolated

(*d*) Cic. de orat. I. 44. "Fremant omnes licet, dicam quod sentio; bibliothecas mehercule omnium philosophorum unus mihi videtur XII. tabularum libellus, si quis legum fontes et capita viderit, et auctoritatis pondere, et utilitatis ubertate superare."

(*e*) L. 2, sec. 4, de orig. juris, I. 2; Dion. Hal. X. 57. See also Puchta's Institut., vol. I. p. 133, et seq.

Greek laws were not introduced, which Cicero informs us was the case in regard to interment: "quam legem iisdem prope verbis nostri viri in decimam tabulam conjecerunt;" (*f*) but this, it is obvious, does not contradict the fact that the twelve tables contained essentially and principally the ancient national laws of the Roman people.

Their influence and long continuance.

This famous code availed not only for the period of the Republic, but also during that of the emperors, whilst it was commented upon by the most renowned of the Roman jurists. Gellius informs us that Labeo, one of the greatest juris-consults, and the founder of the Proculean school, who flourished under Augustus, wrote a commentary on the laws of the twelve tables. (*g*) Gaius also, who lived 200 years later, in the time of the Antonines, the author of the "Institutes" and other great works, wrote *six* books of commentaries "ad legem XII tabularum," many fragments from which are preserved to us in the Pandects. So that the twelve tables continued to be a permanent source of law even in the later times of the state. It was not till the time of the Emperor Justinian, in the sixth century of the Christian era, that the laws of the twelve tables were formally superseded by the legislation of that emperor, after constituting the basis of the Roman jurisprudence amid national struggles, progress and triumphs, for the long period of a thousand years.

These laws in their original form are not extant.

3. It is matter for the profoundest regret that this venerable body of legislation should have reached us only in a fragmentary form. The laws which a great

(*f*) Cic. de leg. II. 25.

(*g*) Gellius' Noc. Att., I. c. 12, VII. c. 15, XX. c. 1.

people clung to during so long a course of ages, whilst they were growing in the love of freedom, increasing in intelligence, and grasping at the dominion of the world, would be a precious relic to possess in their integrity. But that relic is not ours. Not only has antiquity denied us the entire casket, but she has refused to present us with a perfect specimen of its valuable contents. It is an extraordinary fact that we do not possess one of these twelve tables in its original and complete form. Many treasures of art, of science, and of philosophy, have been handed down to us by antiquity, and relics of far less value, in tolerably perfect preservation, some of which we might gladly spare for a single part of the laws of the twelve tables in its pristine condition; but not a trace of an original memorial of these laws has ever been discovered. Cicero informs us that they were learned in the Roman schools in his time, and other authorities tell us that they were posted up for public inspection; but the hope of our ever obtaining a perfect exemplar of these famous enactments has long since expired.

Happily, however, we have a rich store of fragments of the laws of the twelve tables, so that we are able to reconstruct them, at least, to some extent, and restore their ancient form. These fragments are found in both legal and non-legal writers, and, the probability is, that we still possess about two-thirds of this ancient Roman code. A strenuous effort has been made by distinguished modern jurists to collect these fragments, and to connect them in their original shape. From the sixteenth century till the present time this work has been diligently pursued. An eminent French jurist,

Jacobus Gothofredus, (*h*) collected many of them, and they were afterwards published under the title "Jac. Gothofredi fragmenta XII tabularum suis nunc primum tabulis restituta." Heidelb. 1616. 4to. Subsequently an amended edition was presented in the "quattuor fontes juris civilis," Geneva, 1653. They have also been collected in Otto's "Thesaurus jur. civ." tom. iii. p. 1. In the work of Gothofredus entitled "Quattuor fontes &c.," we find not only the leges XII tabularum, of which we get a glance in their original form, but also the Prætorian laws, the Senatus-consultum Trebellianum, the lex Papia Poppæa, and the lex Saturnalia. Haubold has also preserved these fragments in his work entitled, "Inst. jur. Rom. priv. hist. dogm. epitome," Lips. 1821, p. 129. But the most thorough and patient effort has been made by Dirksen, in a work entitled "A Review of the attempts hitherto made at the criticism and restoration of the text of the fragments of the Twelve Tables," Leipzig, 1824. (*i*) In this work of Dirksen, the writer has endeavoured to restore the text of these laws; the treatise has been prepared with great care, and contains a library of knowledge on this interesting subject. It must be manifest that the importance and value of the twelve tables can scarcely be over-estimated by the student of the sources of Roman jurisprudence. Several smaller works have also appeared on this subject, one in Holland, entitled "Fontes tres juris civilis Romani;" it is edited by Casmann and other Dutch jurists, and is a

(*h*) There were two of the Gothofredi, Jacob. Got. and Dionysius Got., who was the father of Jacob., but the son was the more distinguished man.

(*i*) Dirksen "Uebersicht der bisherigen Versuche zur Kritik und Herstellung des Textes der Zwölf. Tafel-Fragmente."

valuable critical edition. This work contains the leges XII tabularum, the edicta prætorum, and the lex Jul. et Pap. Poppæa. The lex XII tabularum only is edited by Casmann.

These fragments have also been published in a very convenient form by Rudolphus Gneist, in his "Institutionum et regularum juris Romani Syntagma," Leipsiæ, 1858. Gneist indicates the sources from whence these relics have been derived. His Syntagma also contains the Institutes of Gaius and Justinian, arranged in opposite columns on the same page, the fragments of Ulpianus, and a *delectus* from the select sentences of Paulus. His book is of great value, and indeed indispensable to the student of the Roman law. (*j*)

TITLE SECOND.

On the Legislation of the Roman Senate.

Section VI.—*The Senatus-consulta.*

The Senate's power of legislation.

1. That the senate had the power of legislating, and that it was not confined to the *populus* in the *comitia*, does not admit of a doubt. But when this power was

(*j*) Another work on the Twelve Tables is by J. N. Funccius, "Leges xii. tabb. suis quotquot reperiri potuerunt fragmentis restitutæ," 1744. 4to. He endeavours to restore the old Latin spelling. The work has no value for the jurist. See Puchta, vol. I. p. 194.

obtained, we have no means of accurately ascertaining. That the senate also possessed it in the time of the republic is a fact certainly known.

The senatus-consulta were a source of the *jus scriptum* as well as the *leges* and the *plebiscita*. This is expressly mentioned by Cicero in his "Topica." Cicero enumerates the organs of legislation as "leges, *senatus-consulta*, res judicatæ, juris peritorum auctoritas, edicta magistratuum, mos, æquitas." (*a*) It is also mentioned in the so-called "Tabula Heracleensis," which contains the lex Julia municipalis, passed in the early part of the eighth century of the state. (*b*) Horace also, in his "Epistles," affirms the same: "Vir bonus est quis? Qui consulta patrum, qui leges juraque servat." (*c*) Hence there can be no doubt, as Gaius observes, but that the senatus-consulta *legibus exæquata sunt*." (*d*)

Antiquity of the senatus-consulta.

Theophilus relates that the senatus-consulta were coeval as to their antiquity with the plebiscita. But whether this be correct it is difficult to decide. On this point he is a *testis unicus*, as it is not mentioned either by Livy or Dionysius. He has been so often treated as a *testis suspectus* upon other points, in which his veracity has been subsequently so fully verified, that perhaps we ought to hesitate in the present case to apply the epithet of *suspectus* to him. (*e*)

Theophilus.

It may not be out of place to mention here that

(*a*) Cic. Top. c. 5. See also Gaius, I. secs. 2. 4.

(*b*) See Haubold (Spangenberg) monumenta legalia, 1830, num. 16. p. 99 sqq. line 72 of this tabula. See also Puchta's Institutionen over the tabula Herac. vol. I. p. 395 and following, and the literature there referred to.

(*c*) Gaius I. sec. 3.

(*d*) Theoph. I. tit. ij. sec. 5.

(*e*) Hor. epis. ad Quintuum, lib. I. xxi. v. 41.

Theophilus was a jurist who lived at the time of Justinian, at the beginning of the sixth century of the Christian era. He was a professor of jurisprudence at Constantinople, and took part in the compilation of what has been known since the time of Gothofredus as the "Corpus Juris Civilis." The lectures of Theophilus, delivered at Constantinople, have been preserved and handed down to our time. They frequently contain historical digressions, and in one of these he states that the senatus-consulta were of the same date as the plebiscita. It is probable, however, that this authority of the senate was not acquired at any definite moment, but that, as is often the case in the development of constitutions, it grew up gradually and imperceptibly. When we examine the earlier instances of the senate's power, we find that it was exercised, at least in the domain of private law, but occasionally and rarely. *Senatus-decreta* were indeed common, but this was not the case with *senatus-consulta.* Hence, in the earlier times, they play an unimportant part so far as the private law of Rome is concerned.

Growth of the importance of senatus-consulta.

It was in the times of the emperors that the senatus-consulta grew into importance—in the early part of the second century of the empire. At this period the popular legislation was extinguished, except in form, and a despotic monarchy existed under the forms of a democracy. From the time of Diocletian the senate became the creature of the emperor, and obsequiously obeyed his command. The days of the republic and of freedom were past.

Period of the senate's greatest activity.

During the interval between the second and third centuries of the empire the obsequious senate exhibited its greatest activity. Thus, the senatus-consulta Trebellianum, Tertullianum, and Orphitianum were respectively

enacted in the reigns of Nero, Hadrian, and Marcus Aurelius. Several others also were passed during this same period. Later we find the word "Oratio," a term applied to a written or verbal proposal made by the emperor to the senate, over the composition of a senatus-consultum: thus we find the expressions "Oratio Severi," "Oratio Caracallæ," and so of the other emperors. These were not senatus-consulta, but by the term Oratio is indicated the extent to which the emperor began to interfere with and even to usurp the legislation of the senate. (*f*) We find the expression "senatus-consulta" still in use in the time of Diocletian, but the senate possessed no legislative power; it was permitted to give its counsel to the prince, but its power and its glory were departed. The first two centuries of the emperors appear to have sufficed for its growth, its grandeur, and its decay.

Mode of legislating in the senate.

2. As to the mode of proceeding in the senatorial legislation, a few words must suffice. The proposed law was introduced by the president of the senate, that is, by the party "qui senatus habebat," and was then submitted to discussion. This, it will be remembered, was not the case with a law introduced into the *comitia*. The proposed law in the senate was also open to amendment, so that the *satura* by which the *comitia* was bound did not bind the *senatus*. Still, the president alone had the authority to introduce a motion for a new law, and he was said to advise for the other members of the assembly (*ceterarum censio*). The celebrated *ceterarum censio* that "Carthago delenda," will occur to the reader of Roman history.

(*f*) See on this point Puchta vol. I. p. 522.

The senatus-consultum, as to its form, was not expressed as a *lex* or command, but, notwithstanding this, it had all the power of a *lex* properly so-called. It was, when passed, engraved on brass or stone, and was as binding on the *populus* as any law enacted in the *comitia centuriata.*

Names given to senatus-consulta.

3. The senatus-consultum was named after the consul who had advised the senate—*senatus censuit*—or in other words, who had introduced the law. In the times of the empire it was named either after the magistrate who presided in the senate, or after the emperor who had advised the legislative act. Thus we have senatus-consulta named Tertullianum, Orphitianum, Trebellianum, and several others named after the magistrates presiding in the senate; also senatus-consulta Neronianum and Claudianum, which took their name from the emperors who made the motion for their introduction. But we find a *single* case in which the name of the party whose conduct had given rise to the senatus-consultum was attached to it, and this is the case of the celebrated senatus-consultum Macedonianum, by which a law was passed which still avails in those lands where the Roman law is received, that a son who borrowed money without the consent of his father, was not bound either during his father's life, or after his father's death, to pay the amount lent. This senatus-consultum received its name, not from any consul nor from an emperor, but, "cum inter ceteras sceleris causas Macedo, quas illi natura administrabat, etiam aes alienum adhibuisset, &c.," (*g*) which probably refers to a certain Macedo, a son who had murdered his father, and, as a warning and a memento, the name of the parricide was given to the law.

(*g*) L. 1. de S. C. maced. 14. 6.

TITLE THIRD.

Of the Edicta Magistratuum, or the Jus Honorarium.

Section VII.—*Origin and extent of the Edict.*

Importance of the subject.

This subject is one of great interest, and of the utmost importance in the development of Roman jurisprudence. The harsh strict principles of the *jus civile* of the early Romans, and their stern national law which had availed for centuries, were ameliorated by the introduction of the laws or edicts of the prætors.

Dr. Maine is of opinion that the principles of the *jus gentium* became active at Rome coeval with the growth of the doctrines of the Stoics; that the jurists who belonged to this sect of philosophers believed; that as it was in the power and duty of a good man to regulate his conduct according to the rules of that primitive state which the Stoics denominated as Φυσις or nature, so it was the duty of the prætors, as legislative organs of the state, by their edicts, to discover these original laws concealed in the *jus gentium*, and to accomplish for the nation what a virtuous man should effect for himself. It must be added that, in addition to this, the spread of the Roman empire, and the ever increasing intercourse of its citizens with other nations, rendered an exclusive adherence to the strict national rules of the *jus civile* impossible. But the following points merit our attention.

1. It was an essential part of the prerogative of the principal Roman magistrates, the *majores magistratus*,

or the *magistratus populi Romani* as they were called, that they should possess and exercise the *jus edicendi*. This was the right of publishing edicts which were binding by law upon the *populus*. It was not, however, the edict of every magistrate that possessed this high authority and importance, but only the edicts of those magistrates who possessed what was technically called a *jurisdictio*. Thus, neither the consuls nor quæstors, the latter of whom, as is well known, had the charge of the treasury at Rome, possessed this *jus* or right, but it belonged to the prætors and to the ædiles curules, who ranked next to them. An important passage of Gaius throws great light upon this subject: he says "jus autem edicendi habent magistratus populi Romani. Sed amplissimum jus est in edictis duorum prætorum, urbani et peregrini, quorum in provinciis jurisdictionem præsides earum habent; item in edictis ædilium curulium, quorum jurisdictionem in provinciis populi Romani quæstores habent; nam in provinciis Cæsaris omnino quæstores non mittuntur et ob id hoc edictum in his provinciis non proponitur." (*h*)

Jurisdiction of the ædiles.

The jurisdiction of the Ædiles was much more limited in the nature and sphere of its operation, but it may be said to have been more extensive in its application. Their jurisdiction extended especially over markets and slaves, and questions which we should now designate by the term police.

A similar authority, as Gaius observes in the passage quoted above, was exercised in the provinces by the proprætors and the proconsuls and at a later period by the præsides. The quæstores enjoyed in the provinces the same authority and discharged the same functions as the Ædiles in Rome.

(*h*) Gaius I. sec. 6.

As an instance of the authority exercised by the ædiles at Rome, may be mentioned the "*actio redhibitoria*," and the "*quanti sive quanti minoris actio sive judicum.*" These were both ædilitian actions. The former was the process employed by the purchaser against the seller to compel him to take back the article sold, on account of some defect and to obtain the return of the purchase money. "Facta redhibitione omnia in integrum restituuntur, perinde atque si neque emtio neque venditio intercessisset." (*i*) The latter was an action similar in principle by which the seller was compelled to make a reduction in the price paid for an article, as, for example, a slave, on account of some latent defect. Both actions were given by the ædiles and must be brought within a short time after the transaction between the parties, the one within six months, and the other within a year. (*j*)

Actio redhibitoria and the quanti minoris actio.

But the edicts of the prætors had a much larger and more important sphere of operation, and it is to these that we must more especially refer.

Edicta prætorum.

The edicts were sometimes said to be *edicta repentina:* that is to say, they were not *perpetua*, they were mere notices, "quod prout res incidit," as Ulpian expresses it, (*k*)—rules made for concrete and single cases, as Cicero explains: "exoritur peculiare edictum repentinum ne quis frumentum de area tolleret ante quam cum decumano pactus esset." (*l*) It is not this *edictum repentinum* that plays so important a part in the Roman law, but the *edictum perpetuum*—that which according to Ulpian's expression is "id quod jurisdictionis perpetuæ causa

Edicta repentina.

Edictum perpetuum.

(*i*) L. 13 s. 2. D. 41.2; l. 19. D. 41.3.

(*j*) L. 1, sec. 1; l. 38 pr. de æd. ed. 21. 1; also Cic de off. iii. 17. See also Puchta's Ins. vol. I. pp. 344 345.

(*k*) L. 7. pr. de juris d. 2. 1.

(*l*) Cic. in Ver. iii. c. 14, also Asconius in Cornel. edictum perpetuum.

non quod prout res incidit, in albo vel in charta vel in alia materia propositum erit." (*m*) The edictum perpetuum was put forth by the prætor, at the commencement of his year of office; and contained the *normæ* or rules by which it was his intention to regulate his tribunal during the year of his magistracy. It was called an *edictum perpetuum*, as Mr. G. Long correctly observes, "not because the rules which it contained were fixed, for this was not the fact; nor is it the meaning of the Roman word perpetuum, which simply means continuous" and not perpetual in our sense; but because every prætor upon entering on his office, published his *edict* and thus the edicts flowed on so to speak *in perpetuum* or continuously. (*n*) At first, when the prætor had made his edict, he was only morally bound to observe the rules which it contained, but at a subsequent period, when this moral force was found too weak to bind these magistrates to their own rules, the inconvenience arising from the uncertainty of the law was removed by a special plebiscita passed in the year 687 A.U.C., the lex Cornelia "de edictis perpetuis." This law bound the prætors to put forth their edicts in a definite form, and forbade their altering or extending the edict during the year of office,—"ut prætores ex edictis suis perpetuis jus dicerent, quæ res cunctam gratiam ambitiosis prætoribus, qui varie jus dicere solebant, sustulit." (*o*)

Lex Cornelia.

Edictum tralaticium.

2. Such then was the edictum perpetuum—a norma or rule made to endure only for a year, and originally confined to that period. Each prætor made his own rule, which as far as he was concerned had the force of

(*m*) L. 7. pr. de juris D. 2. 1.

(*n*) Geo. Long's Lectures in the Middle Temple, 1846-7.

(*o*) Ascon. in Cornel. (Orell. p. 58) See especially Dio. Cass. xxxvi. 23.

law, but only for his year of office. Hence Cicero uses the apt phrase "legem annuam dicunt esse" (*p*) as applicable to the edict. But, when the edict of a prætor was found to contain principles that were permanently useful, the succeeding prætor was at liberty to adopt them and to incorporate them in his own edict. This is what is understood by the *Edictum tralaticium:* —namely, the transferring of the edict of the previous prætor by the new one into his own edict. It was upon this as a foundation that the *jus honorarium* arose, which was a combination of legal principles or propositions formed from the edicta tralaticia. It was, however, only those "*qui honores gerunt*" that possessed this right. As the *jus suffragium* entitled the civis to vote in the Comitia, so the *jus honorarium* gave the prætor the right to promulge the edict. Nor was it the exercise of an usurped power on his part, but the exercise of a species of sovereignty legitimately derived from the people themselves. An absurd etymology or explanation is given of this term by Papinianus. He says "jus prætorium est, quod prætores introduxerant adjuvandi, vel supplendi, vel corrigendi juris civilis gratia, propter utilitatem publicam; quod et honorarium dicitur," and after this clear explanation he absurdly adds, "*ad honorem prætorum sic nominatum.*"(*q*) It is strange that after so able an explanation of the *jus honorarium*, so childish a derivation should have been given. The correct view is presented by Pomponius, in his celebrated and able sketch of the history of Roman law: "Eodem tempore et magistratus jura reddebant, et ut scirent cives, quod jus de quaque re quisque dicturus esset seque præmuniret, edicta proponebant; quæ

Jus honorarium.

(p) Cic. in Ver. i. 42.

(q) L. 7. sec. 1. de jus. et jur. D. i. 1.

edicta prætorum *jus honorarium* constituerunt. *Honorarium dicitur, quod ab honore prætoris venerat.*" (*r*) A correct explanation is also given to us in a passage in the Institutes: "Prætorum quoque edicta non modicam juris obtinent auctoritatem. Hoc etiam *jus honorarium* solemus appellare, *quod, qui honores gerunt, id est magistratus*, auctoritatem huic juri dederunt. Proponebant et ædiles curules edictum de quibusdam causis, quod edictum jus honorarii portio est." (*s*) Those who bore *honours* in the state had given their sanction.

Period when the edict was most active.

3. The *jus edicendi*, from the period of its commencement till its decline, was employed with greater or less activity by the Roman magistrates—the prætors and the ædiles. It was, however, in the *sixth* and *seventh* centuries of the state that it attained its greatest sway, not a very long period before the age of Cicero. At this time, and especially in the seventh century, the edict was employed for the purpose of making important reforms in the state, always proceeding upon the basis of the *jus gentium*. Till the period of the sixth and seventh centuries the edict gave rise to no legal reforms properly so called. Its office till then was simply to supply defects, to fill up gaps, so to speak, in the Roman jurisprudence. When we come to the study of the various Divisions of the Roman law after this period, we shall see to what an extent the principles of the *jus gentium* and *æquitas*—or, as we have elsewhere termed it, the *universal element*—was introduced, and we shall observe that it exerted the greatest possible influence. In a narrative left by Cicero, he informs us that the custom had been for the Roman youths to study the laws of the twelve tables

(*r*) L. 2. sec. 10. 1. 2. (*s*) Ins. Jus. lib. i. tit. 2. sec. 7.

in their schools; but now, he says, they learn the edicts of the prætors. (*t*)

In the century before Cicero's time, able jurists had flourished, but not one had busied himself with the edict. Their time and abilities had been employed in commenting upon and explaining the laws of the twelve tables, and upon the *formulæ* used in the civil process of the state. Two contemporaries of Cicero—one an older the other a younger man—wrote upon the edict. Servius Sulpicius and Aulus Ofilius, the former, who was an elder friend of Cicero's, was the first scientific writer on the edict, and the latter jurist also wrote an extensive commentary upon the same subject. Pomponius informs us, "idem (that is Ofilius) edictum prætoris primus diligenter composuit, nam ante eum Servius duos libras ad Brutum perquam brevissimos ad edictum subscriptos reliquit." (*u*)

Salvius Julianus.

4. A most important epoch for the *jus honorarium* was the collecting and re-editing of the edicts by Salvius Julianus, a distinguished jurist who flourished in the reign of Hadrian. We do not possess his edition of the edicts, but many fragments of it are contained in the Pandects. Each succeeding prætor who felt that it was his duty to advance the legal reforms of his country, had added something to the general store of jurisprudence. In the course of time this gave rise to much inconvenience, and a consolidation of the body of edictal law must have become an absolute necessity. This was the work attempted and accomplished by Salvius Julianus. Eutropius, in his condensed history, says, that "Julianus sub divo

(*t*) Cic. de legib. bk. i. c. 5. compare bk. ii. c. 23.

(*u*) L. 2. sec. 44. de orig. jur. i. 2.

Hadriano edictum perpetuum composuit." (*v*) In the "Constitutio tanta," or "δεδώκεν" as it is called, which contains the Latin address of Justinian upon the publication of the Pandects, 533 A.D., and derives its name of "*constitutio tanta*" from the words by which the address is headed: "Tanta circa nos divinæ humanitatis est providentia," &c. (*w*)—in this *constitutio* it is said that Julianus undertook this work by imperial authority, "doctissimus Julianus id ipsum apparet dixisse, et *ad imperiali auctoritate* super exortis controversiis implorasse supplementum, et insuper Hadrianus piæ memoriæ, quique Prætorum annua edicta in brevem quendam coegit tractatum, optimum Julianum ad hoc assumens," &c. (*x*) In another passage it is stated of Salvius Julianus, "summæ auctoritatis hominem et prætoriani edicti *ordinatorem*." (*y*) Again, it is said, "et ipse Julianus, legum et edicti perpetui *subtilissimus conditor*." (*z*) If these expressions are carefully weighed, it will be clear that Julianus did not write a commentary on the edict, as some have supposed, but that what is intended is, that he gave a new and consolidated edition of the edicts of the prætors. In the "constitutio tanta," as given in the Codex, we are informed by Justinian that the consolidation of the edict was done by Hadrian himself. He says, "et non ipse solus (*i.e.*, Julianus) sed et divus Hadrianus in compositione edicti et senatus-consulto."(*zz*) But this associating of the name of Hadrian

(*v*) Eutropius, 8. 9.

(*w*) This "constitutio tanta" is to be found between the Institutes and the Digest in the Corpus juris civilis.

(*x*) Sec. 18 constituta tanta.

(*y*) L. 10. cod. in fin. "de condic. indeb. iv. 5."

(*z*) L. 2. cons. tanta, sec. 18. cod. i. 17.

(*zz*) L. 2. sec. 18. Cod. "de vetere jure enuc." i. 17. In this law in the codex we have the constitutio tanta referred to above repeated and given more in detail.

with Julianus can only mean that the work of the latter was done by public authority, and that as a consolidation of the edictal law under imperial sanction, it was given to the magistrates as an authority by which, in the administration of justice, they were for the future to be bound.

Close of the exercise of the jus honorarium.

This revision and consolidation of the edicts thus became binding upon the prætors, and was known as the *edictum perpetuum*. The magistrate had no longer any power to alter it by the promulgation of new rules. This important fact renders the time of the redaction of the edicts under Hadrian an epoch in the history of the Roman law. The Edict became the very *vox viva* of the law. Hence, after this period, the prætors ceased to be the active agents in the legal reforms of the state. Thus, this important magistrate, who during his brief year of office exercised in part the legislative sovereignty of the people was, by this work of Julianus, from the time of Hadrian, deprived of his very large but beneficial authority. It may be observed that it is from this period the edict is called *perpetuum* in an entirely new sense. It was *perpetuum* in the sense of *fixed*, that is, it was no longer in the prætor's power to make any alteration in its condensed and stereotyped form. The top stone was put to the work of the prætors, and the *jus honorarium*, which had been active from the time of Cicero to Hadrian, then ceased to exist.

Importance of the jus honorarium.

5. This *jus honorarium* was of the most extraordinary importance in the development of the Roman Law. In the place of the *jus strictum* there were introduced by means of the edict, the universal principles of the *jus gentium*, the influence of which was increasingly felt in ever-widening circles. To the explanation and

illustration of these valuable legal principles, as embodied in the edicts of the prætors, the most distinguished of the Roman jurists applied themselves. Upon opening the Pandects almost in any place the eye falls upon the names of Gaius "ad Edictum provinciale," or of Ulpianus or Paulus "ad Edictum." A short account will show the importance which the Roman jurists themselves attached to the edict. We may glance at some of the principal writers. Servius Sulpicius and his disciple, both of whom were contemporaries of Cicero, we have already mentioned. Labeo, also in the time of Augustus, and Sabinus, the former the founder of the Proculian school, and the latter, a disciple of Capito, who wrote in the time of Tiberias, and gave the name of Sabinian to the opposite school, both wrote upon the edicts. We have no extracts in the Pandects from the works of Labeo and Sabinus, since the *edictum perpetuum* of Julianus was not the work upon which they commented. But Gaius commented upon the Julian edict, and also upon the edicts before their consolidation under Hadrian. Pomponius wrote a great commentary on the edict, at least eighty-three books, as the eighty-third book is mentioned in the Pandects. Ulpian also wrote at least the same number of books on the edict. Paulus, the contemporary of Ulpian, wrote eighty books; Furius, five books; Saturninus at least ten books; Papirius also twenty-five books—we have many extracts in the Pandects out of the twenty-fifth book. In fine, more than one-half of the Pandects is made up of extracts taken from the writers on the prætorian edict.

SECTION VIII.—*The Character and Importance of the Jus Honorarium.*

Character of the jus honorarium.

I. The entire structure of the *jus honorarium* is so foreign to our modern notions, that it is not strange that it should have been found difficult to comprehend it fully and clearly. For centuries it was regarded as the product of the encroachment and deception of the prætors. Even Heineccius strenuously defended this view. That this perplexity and mistake should have arisen is not to be wondered at, since the *magistratus populi Romani* has been compared and confounded with our modern judge. But the office and authority of the Roman prætor was of an entirely different nature. In his *imperium* he possessed, as we have already stated, a species of sovereignty. It would be much more correct to liken the prætor to a modern civil ruler or prince, than to a civil magistrate or judge. Papinianus, in a passage already quoted, indicates with wonderful precision the authority and dignity of the prætorian *jus:* "Jus prætorium est, quod prætores introduxerunt *adjuvandi, vel supplendi, vel corrigendi juris civilis gratia*, propter *utilitatem publicam;* quod et honorarium dicitur." And Marcianus, in a pithy sentence, condenses the spirit of the above explanation: "Nam et ipsum jus honorarium *viva vox est juris civilis.*" (*a*) The Roman jurists are full of praise as to this *viva* or *vivida vox*, and their conception of its true nature and importance is sufficient to refute the incorrect opinion of Heineccius, and of others who have since embraced his views.

(*a*) L. 7. 8. de just. et jure, I. 1.

Advantages of the edict.

It would be well for us if we were in a condition, in our legislation, to attain to something like the wholesome exercise of the authority of the prætor. It is very certain that we are not. Every year in Rome there was a new prætor, who was desirous that his name should be handed down to posterity as a benefactor to his country. This he did not hope to accomplish by usurpation or by the sword, but by a prolonged and careful preparatory study of the laws of his country, so that when his year of office arrived he might lay as it were a polished stone upon that symmetrical pile of legislation which had been the work of a long line of illustrious predecessors. If he succeeded in the exercise of his *jus edicendi*, his name became associated with the jurisprudence of his country. His successor in his edict would incorporate the new rule, if it were valuable, and in his turn sanction afresh the extension of some principle derived from the *jus gentium*. In other words, he would practically apply those principles of equity and justice which he believed to belong to no age and to no country, but to be rooted and grounded in that moral nature which has been given to man by the Great Supreme Himself. If, on the other hand, the prætor did not succeed, his legislative act fell to the ground. A most important check upon the legislation of the prætors arose from the fact that the magistrate, after his year of office, and at *any* subsequent period, could be proceeded against upon the ground of his own edict. This is expressed in one of the titles in the Pandects: "*quod quisque juris in alterum statuerit, ut ipse eodem jure utatur.*" (*aa*) We may easily imagine what a check this would be on the legislative adminis-

(*aa*) Lib. II. Tit. iii. D.

tration of the prætors. Ulpian, upon this, says, "Hoc edictum summam habet æquitatem et sine cujusquam indignatione justa." (*b*) How different is it with the legislation of modern times. What difficulty to get rid of a law that is even acknowledged to be bad. What inconsistencies and contradictions pervade our statutes. Who amongst us can claim to possess a knowledge approaching to strict accuracy of our legal principles or our laws?

Again, the legislation of the prætors was always of a nature homogeneous to the laws already in existence. How very different is it with us; we are always striving for some new thing, rather than for the development of acknowledged principles, and the result is that our law is full of flaws and inconsistencies. But it could not be so in the exercise of the *jus honorarium*. By virtue of the *imperium* the prætors advanced step by step in practical legislation at Rome, until their system attained a symmetry and a perfection which has secured for ages the admiration of mankind.

Its importance practically.

II. The practical importance of the *jus honorarium* consisted in this, that it was always softening the rigor of the *jus civile*, and advancing the gradual triumph of the principles of the *jus gentium*. Ulpian, quoting Celsus, said it was the cultivation of the "*ars boni et æqui*" (*c*) —the gradual smoothing of the asperities of the original national law. Before the appearance of this new institution, the *jus strictum* universally prevailed at Rome. Finally, it was the introduction of the *universal* element by means of the prætorian *jus edicendi* that raised the Roman law to the position it occupied not only in Rome, but which it still holds in Europe, and seems

(*b*) Titulus and l. 1. pr. "quod quis &c. II. 2.

(*c*) L. 1. sec. 1. d. jus. et jur. I. 1.

destined to occupy in future times in civilized nations. The careful study of the results of the exercise of the *jus honorarium* will be found fully to justify what may appear to some an exaggerated view. The aim of the prætors was always to realize the idea of *æquitas*, and to do this by means of practical useful legislation. They did not strive for a mere ideal equity, but confined their exertions to the moulding, the applying, and the establishing the laws of the *jus gentium* to the real exigencies of common life in a powerful and constantly growing nation. With these facts before us, it must be evident at a glance that it is impossible to set too high a value on this *jus honorarium* so long and admirably developed by means of the *jus edicendi* of the Roman prætors.

Section IX.—*The more recent treatment of the Prætorian Law.*

Extensive fragments of the edicts preserved.

If the work of Salvius Julianus had been preserved, we should now possess in his compilation a complete specimen, or rather exemplar, of the prætorian law. But we do not possess this great work, nor have we the edicts in their entire form. Still, many fragments of the edicts are found stored in the treasures of the Pandects. Fortunately, the Roman jurists who have preserved these fragments, have given them to us in the *ipsissima verba* of the prætors. One half, or about that proportion, of the Pandects, consists of extracts from the edicts, or excerpts and commentaries relating thereto. To such a degree is this the case, that we are able, to some extent, to restore the edicts as they were consolidated in the Julian edition.

Efforts made to restore the edicts.

As the principal sources of the Roman law were the laws of the twelve tables and the edicts of the prætors, it is quite natural that strenuous exertions should have been made to reconstruct them in their original form. We have already made reference to what has been done in this respect in regard to the twelve tables; a brief review of the efforts made to restore the edicts shall close the present title.

Guil. Ranchin, in the 16th century, laboured to do this and to arrange them, in a work entitled "Edictum perpetuum restitutum," Paris, 1597. He was succeeded in his efforts by Jacob. Gothofredus, who attempted the same in his "Fontes quatuor juris civilis," already refered to. A third effort, which, it is to be regretted, was not completed, was made by Heineccius. His intention was to restore the edicts, and to make a commentary upon them. The work, as far as it was accomplished by Heineccius, will be found in the second part of his posthumous writings, "Edict. perpet. ord., &c., pars prima et secunda."(*a*) What Heineccius left incomplete, has been accomplished by a Dutch jurist, De Weyhe, libri tres edicti, &c., Cell. Lun. 1821. Van Reenan, also a young Dutch jurist, in "Fontes tres juris civilis Romani antiqui," 1840, p. 11 sq., has endeavoured with much ability to present the edicts of the prætors in their original form. (*b*)

(a) See also Abr. Willing "Fragmenta edicti perpetui," Franequ., 1733-4.

(b) G. C. J. Van Reenan in C. A. Den. Tex. "Fontes tres, &c.," Amstel. 1840. 8vo. p. 41.

TITLE FOURTH.

Of the Constitutions of the Emperors.

Section X.—*General historical remarks.*

Ancient right

I. The right of putting forth imperial constitutions is acknowledged to have been as old as the empire itself. Et primo quidem temporibus Divi Augusti, mox deinde Claudii, *Edictis* eorum erat interdictum, &c. (*a*) Although Gaius only mentions a *three-fold* way in which this right was exercised, we must add another term to the formula as given by him: "Constitutio principis (says he) est quod imperator *decreto* vel *edicto* vel *epistula*, constituit. Nec umquam dubitatum est, quin id legis vicem optineat, cum ipse imperator per legem imperium accipiat." (*b*) To these must be added the *mandata*. The distinction between these was the following:

Leges edictales

1. The *leges edictales* were imperial constitutions published with a view to a legal reform, and by these a new legal *norma* or rule was established. It was the assumption of the *jus edicendi* by the imperator as the chief magistratus populi Romani.

Rescripta.

2. *Rescripta.* — This was a term applied to the resolutions or answers made by the emperor to any legal question which had been submitted to him. Upon a question, accompanied by a petition, being submitted to the emperor, he granted a formal authoritative answer. When this reply was published, which was frequently the case, the answer to the question obtained the binding force and power of law.

(*a*) L. 2. pr. ad. S. C. Vel. D. 16. 1. (*b*) Gaius, I. 5.

3. The *decreta* were decisions which the emperor as supreme judge gave in cases submitted to his decision. These decisions often contained rules applicable not only to the actual case submitted, but were held to be applicable to other similar cases when they arose. It was thus that the *decreta*, when published, obtained also the authority of law. That the princeps had thus the right to act as the highest judge was never doubted by the Romans. Decreta.

4. The *mandata* were instructions given by the emperors to the imperial functionaries in the provinces. In the provinces of the people the pro-consuls and the pro-prætors had authority as magistrates of the populus Romanus; but in the imperial provinces the *legati* and other imperial officers governed. These officers of the princeps received from the emperor rules to guide them in concrete cases. As, for example, in the case of military testaments, as Ulpian informs us, "Militibus liberam testamenti factionem primus quidem Divus Julius Cæsar concessit, sed ea concessio temporalis erat, postea vero primus Divus Titus dedit: post hoc Domitianus; postea Divus Nerva plenissimam indulgentiam in milites contulit, eamque et Trajanus secutus est, et exinde *mandatis* inseri coepit caput tale."(*c*) Mandata.

These arose out of special cases, and were not intended as acts of legislation; but when in the decision of the concrete case a new legal rule was laid down, and the *decretum* was published, this principle or rule became binding as a law for other cases also.

II. In the first two centuries of the Empire, new edicts with a view to the establishment of legal rules were of very rare occurrence. The Romans at The Oratio of the emperors preceded the lex edictalis.

(*c*) L. 1. de test. mil. D. 29. 1.

this period were far too republican in their views readily to allow of such a stretch of monarchical power. The custom was for the Emperor to send an oratio to the senate, and the law based on it assumed the form of a senatus-consultum. This was also the case with many important legal reforms, and the *leges edictales* were then scarcely known. But the *rescripta* and the *decreta*, as mentioned by both Gaius and Ulpian, became of more frequent occurrence.

It was in the time of Diocletian that this state of things was altered, the republic was crushed, and the *leges edictales* had become the usual mode in which the emperor exercised his power. The *lex edictalis*, however, must not be confounded with the edictal law of the prætors, being the same name for quite a different mode of exercising legislative power. The emperors claimed the right of establishing edictal law by virtue of their supreme and sovereign power. The terms they employ, which are preserved in the Codex, prove this. Justinian says, "hanc edictalem legem in orbem terrarum ponimus." (*d*) Again the Emp. Leo. "Hac edictali lege in perpetuum valitura sancimus." (*e*) Again, Honorius and Theodosius say, "Igitur in perpetuum edictali lege sancimus." (*f*) It is probable that the last two extracts give the usual forms of expression employed by the Emperors. Thus the Edicts of the prætors having entirely ceased, as had also the *reponsa prudentum*, the principal source of law after the time of Diocletian, became the *leges edictales* of the emperors.

Lex regia.

III. We have already referred to the so-called "Constitutio tanta" which was the Latin address put forth by Justinian on the publication of the Pandects,

(*d*) L. 29. C. d. test. vi. 23.
(*e*) L. 6. C. d. sec. imp. v. 9.
(*f*) L. 13. C. quod cum eo. iv. 27.

now to be found immediately before the Digest in the printed editions. Another constitution may be also mentioned here which immediately precedes the "Constitutio tanta;" this is called the "Constitutio Deo auctore," and was published by Justinian previously to the Digest, of which it contains the conception. Both of these constitutions may be found in the Codex in leges 1 and 2, "de vetere jure enucleando, &c." book I title 17. In these imperial Constitutions Justinian discusses the question as to the power and authority by which the emperors claimed the right to promulge new laws. This right he refers in the most distinct terms to a certain *lex regia*. In the "Constitutio Deo auctore" he says "Quam enim *lege antiqua, quæ regia nuncupabatur*, omne jus omnisque potestas populi Romani in imperatoriam translata sunt potestatem, &c." (*g*) Again in the Institutes he says "Sed et quod principi placuit, legis habet vigorem; quum *lege regia* quæ de ejus imperio lata est, populus ei et in eum omne imperium suum et potestatem concessit." (*h*) It has been thought by some that Justinian makes this assertion of a *lex regia* having conferred this power upon the emperors in consequence of a statement made by Ulpian, who in almost the same words as those above quoted from the Institutes says "Quod principi placuit, legis habet vigorem; utpote quum *lege regia* quæ de imperio ejus lata est, populus ei et in eum omne suum imperium et potestatem conferat." (*i*) There is no doubt now that Justinian was mistaken as to the existence of a *lex regia* which permanently and finally conveyed the entire legislative power of the *populus* to the monarch. No such law has been discovered and it

(*g*) L. 1. C. d. vet. jur. enuc. l. 17.
(*h*) Inst. lib. I. tit. 2. sec. 6.
(*i*) L. 1. D. const. prin. l. 4.

is now quite certain that no such law ever existed. The *lex regia* which Justinian misunderstood was not a law by which the Republic was changed into a monarchy—not a law which conveyed the legislative power from the people to the monarch, but a *lex* by which at the commencement of each reign the *imperium* was conveyed to the individual ruler. It was a *lex de imperio*, by which the monarch for the time being was invested with legislative power, which must precede the exercise of such power to render it legitimate and valid. Practically, some of the emperors did not regard this *lex*, but seized upon the *imperium* and mounted to power as they were best able. It was a legislative authority conferred similarly to the capitulation of the German emperors, on which occasion the oath was administered to them, and from which period their power commenced. So the *lex regia* of the Romans was not a law passed once for all, but a law enacted afresh for each succeeding emperor.

Lex de imperio.

1. That this view is correct appears from the historical connection of this peculiar imperial legislative power. In the time of the ancient Roman *reges*, their authority dated only from the period of the passing of the law which invested them with royal authority. It was the *lex* which made the *rex*. Again in order to invest the magistrate with legislative power, subsequently to the period of the kings, there was invariably a *lex* passed in the curia, "*de imperio;*" hence it seems perfectly natural to conclude that a principle so deeply rooted in the Roman law, and of which other illustrations might be adduced, would continue operative as far as possible in the times of the emperors. The discovery of the treatise of Cicero entitled "de republica" has removed much doubt which previously existed

upon the subject, and this treatise contains much valuable information with regard to the present topic. (*j*)

2. We have a fragment of this *lex regia* preserved in the "*lex de imperio Vespasiani*," a relic found in Rome in the 14th century and still preserved there. This fragment contains a *lex* properly so called, and not a senatus-consultum, as has been erroneously supposed, in consequence of the passage in Tacitus in which he says "eo senatus die, quo de imperio Vespasiani censebant." (*k*) This *lex* empowered Vespasian to conclude alliances, to originate senatus-consulta, to elevate persons to magisterial and senatorial rank, to put forward ordinances having the power of law, &c. It was certainly a *lex* not made for future emperors, but for Vespasian *alone*, and hence we may infer that a similar *lex* was passed in every like case. This relic probably preserves the form which was usually employed for each succeeding Roman emperor.

3. Gaius also in a passage in his Institutes fully confirms this view. Speaking of the imperial power, he says, "Constitutio principis est quod imperator decreto vel edicto vel epistula constituit. Nec umquam dubitatum est, quin id legis vicem optineat, *cum ipse imperator per legem imperium accipiat.*" (*l*) When the expression of Gaius, "*per legem imperium accipiat*," is carefully weighed, it strongly supports our view, and entirely explains and coincides with the words of Ulpian at a later period already quoted, "*utpote quum lege rege quæ de imperio ejus*, &c." (*m*) From these con-

(*j*) Cic. de rep. bk. II. 13. 17. 18. 20. 21.

(*k*) Tacit. Hist. IV. 6. See also Haubold's Spangenberg monum. legalia. p. 221. sqq. and Puchta's Inst. vol. I. 382.

(*l*) Gaius I. 5.

(*m*) L. 1. pr. D. cons. prin. 1. 4.

siderations we may conclude that the *lex regia* was a law passed for each single prince, with the special object of endowing him with the *imperium*. But when the power of the monarch increased, and the old republican principles of popular freedom languished, —probably about the close of the first century of the empire—the *lex regia*, which had been the expression of the popular power, was, entirely superseded by the decrees of the senate.

Section XI.—*Of the Imperial Constitutions.*

In the times of the classical jurists no official collection of the imperial constitutions existed, these constitutions being woven into the works of the jurists themselves. Of these legal treatises we have several. The first was made by Papinianus, under the "Divi Fratres," a phrase applied to Marcus Antoninus and Verus. Papinianus, who wrote about 161 A.D., left *twenty* books on these imperial constitutions. Julius Paulus made also a collection of the imperial *decreta*, from which there are many extracts found in the Pandects. Later came the codices, which is a term applied to collections of imperial constitutions. Of these, composed at different periods, we find there were four, namely, 1—The Codex Gregorianus, 2—The Codex Hermogenianus, 3—The Codex Theodosianus, 4—The Codex Justinianus.

Codex Gregorianus and Codex Hermogenianus.

I. The Codex Gregorianus and the Codex Hermogenianus are usually mentioned together, the Codex Gregorianus being always placed first. This fact determines the legal relations of these imperial collections: that the Codex Gregorianus was the principal

work, and that the Codex Hermogenianus was intended to be merely supplementary. It explains also the reason why they were always mentioned together. So far as we are acquainted with these codes, this explanation is fully confirmed. The Codex Gregorianus contains all the most important imperial constitutions published during the reigns of Trajan and Hadrian, until Diocletian and Maximian inclusive. This comprises a period extending from about A.D. 98 till about A.D. 300. The Codex Hermogenianus also contains selections from constitutions during this same period, from the very earliest, but it extends beyond the time of Diocletian and Maximian to the end of the reign of Constantine. Thus the Codex Hermogenianus reaches over a period both earlier and later than the Codex Gregorianus.

Their divisions

The external divisions of the Codex Gregorianus indicate that it was the older work. It was divided into books, of which we know there were at least *thirteen*, as we are in the possession of extracts out of the 13th book. These books are arranged in titles, and under these titles the constitutions are chronologically disposed.

The Codex Hermogenianus, on the other hand, does not appear to have been divided into books, but simply into titles, whilst these titles have the same rubrics or inscriptions as the Codex Gregorianus. These facts seem very clearly to indicate that the Codex Hermogenianus was intended to be supplementary to the Codex Gregorianus.

The time when these works were published seems doubtful. The Codex Gregorianus is certainly before Constantine, whilst the Codex Hermogenianus was probably compiled in the time of that emperor. The

Codex Hermogenianus takes its name from the compiler, Hermogenianus, who is the youngest jurist mentioned in the Pandects. He flourished in the time of Constantine.

These codes were not put forth *publica auctoritate*, but on account of their great importance they were constantly quoted in the tribunals, and their validity was admitted by later emperors, as if they had proceeded from public authority. Their contents also, for the most part, are in our possession. But unfortunately, no MS. of them in their original form has been found. They have also come to us through a very impure channel, having formed the basis of the West Gothic legislation.

Breviarium Alaricianum.

When Alaric in the sixth century founded the West Gothic kingdom, he allowed the conquered Romans to retain their own laws. The Germans in that kingdom lived under German law, and the subject Romans were permitted to live under Roman law. The same, also, was the case with the East Goths and with the Burgundians.

The codes above referred to are found in this "Breviarium Alaricianum," as it is called, published in the year 506 A.D., a legal work which contains also other important relics of Roman law.

In this "Breviarium Alaricianum" a two-fold division is made, and the words *jura* and *leges* are used to mark this division.

The term *jura* was used to denote those portions of the West Gothic code derived from the "Institutes of Gaius," the "Fragmenta Ulpiani," and the "Pauli sententiæ receptæ;" whilst under the rubric *leges* there came the Codex Gregorianus, and the Codex Hermogenianus. It is, however, certain that in the "Bre-

viarium Alaricianum" as we now possess it, we have not these two codes entire, so that we may probably conclude that we have not the whole of this "Breviarium Alaricianum." From certain sources besides the West Gothic Code we possess the means of ascertaining partially the contents of the Codex Gregorianus and the Codex Hermogenianus. One important recent discovery, the "Vaticana Fragmenta," as they have been named, affords valuable aid for the verification and correction of these codes, and the editions now published, with additions and corrections, have superseded and rendered older editions of the codes for critical purposes entirely useless. (*a*) Much that we find in these codes is repeated in the Codex Justinianus; but the form in which the constitutions appeared in the early codes was varied in the later legislation of Justinian.

Editions of the Breviarium.

The only entire edition of the Breviarium Alaricianum, until recently was that of Sichard, published in Basle, 1528. A new and valuable critical edition, as we have already said, has entirely superseded this, published by "Haenel, Lex Rom. Visigothorum ad LXXVI. libror manuscrip. fidem recognovit, etc." Lips. 1847—49. (*b*) This edition contains the following constituent parts of the "Breviarium Alaricianum" in the following order: 1—Theodosianus Codex; 2—Novellæ of Theodosius the second, Valentinian the third, Marcian, Majorian, and Severus; 3—The Institutes of Gaius; 4—The receptæ sententiæ of Paulus, in five books; 5—Thirteen titles of the Codex Gregori-

(*a*) The so-called "Vaticana Fragmenta" were discovered by Mai, and published at Rome in 1823, 8vo., and also at Paris in the same year; subsequently at Berlin, in 1824, 8vo., with the title "Fragmenta Vaticana," which has since clung to these fragments, see on this Puchta's Instit. vol. I. pp. 305, 306.

(*b*) See Vangerow's Pandekten, p. 7 et seq., vol. I. for valuable notices of the literature.

anus; 6—Two titles of the Codex Hermogenianus; 7—A small fragment from Papinian's *responsa*.

The two codices are also to be found in Schulting's Jurispr. vet. antej. pp. 683—718, and in the carefully edited Berlin edition, by Hugo, of the pre-Justinian law, tom. I. p. 265 sqq. Also in the second part of the Bonn Corp. jur. civ. antej., 1837, by G. Haenel.

Codex Theodosianus.

II. The Codex Theodosianus was published in the time of Theodosius II. This code was intended for the eastern empire. In the year 429 A.D. a commission of eight men were appointed to make a collection of the imperial constitutions, after the pattern of the Gregorian and Hermogenian Codes, to extend from the time of Constantine, when these codes were completed, to that of Theodosius II and Valentinian III. "Ad similitudinem Gregoriani atque Hermogeniani codicis eunctas colligi constitutiones decernimus, quas Constantinus inclytus et post eum divi principes nosque tulimus, edictorum viribus aut sacra generalitate subnixas." (*c*)

To these eight persons, who are called *illustres* and *spectabiles*, an advocate was also added. In the year 435 this commission was superseded, and a new one consisting of sixteen persons, partly *illustres* and partly *spectabiles* were authorized to proceed with the unfinished work. In 438 A.D. the latter commission completed its task, when the Emperor Theodosius II gave both his sanction and his name to the work. In February of the same year the code was promulged; when it was ordained that it should come into operation from the 1st of June in the following year, 439, and was pronounced to be the alone source of the *jus prin-*

(*c*) L. 5. L. 6. Cod. Theo. D. const. princ. (recently discovered).

cipale from the time of Constantine till the period of its publication. In 438 the new code was sent to Rome, where it was received and published at once by acclamation in the senate.

This work was originally possessed by us in a very imperfect form, but through recent discoveries much has been restored. A genuine fragment referred to above was discovered in the Ambrosian Library in Milan, by Clossius, in the year 1820. It is an imperfect MS. of the Breviarium, and contains the protocol of the senate in which the Codex Theodosianus was published; a register of the rubrics of the Codex Theodosianus contained in the Breviarium, with several interpolated additions taken from the genuine Codex; also the Codex of the Breviarium as far as the fourth title of the second book. This was published by Clossius in 1824.

But the most important discovery was made by Peyron in Turin, and by Bandi von Besme, who in 1820 found forty-four leaves of a MS. *rescriptus* of the genuine Codex Theodosianus, part of which was published in 1823; the portion subsequently discovered by Bandi von Besme, and which had been overlooked in 1820 by Peyron, was published in 1843. It is still a matter of deep regret that we do not possess a complete copy of the Codex Theodosianus. About two-thirds of the entire code are saved; one-third of which is derived from the Breviarium Alaricianum, and the remainder from the newly discovered sources just mentioned.

Its divisions.

The Codex Theodosianus was divided into sixteen books, which were again subdivided into titles. The matter is distributed under these titles chronologically; whilst the constitutions of the emperors from

Constantine till Theodosius II are presented in their original and complete form. Without this Codex Theodosianus a deep and thorough acquaintance with the existing Codex Justinianus would be impossible. Hence, it is fortunate that so much has been preserved, although through the corruption of the MS. and the ravages of time much has been lost. That we shall ever possess a complete exemplar is now very improbable.

As to the editions of the Codex Theodosianus, there are two especially deserving of notice. Amongst the older editions is that of Jacobus Gothofredus the celebrated French Jurist, and the author of the "Quatuor Fontes." It was edited after the death of Gothofredus by A. Marville, Lyons, 1665, folio, 6 vols., and subsequently by Ritter, Leipsic, 1736—45, folio. This is a most learned and acute work, and contains an excellent commentary. The later and more perfect edition is that of Gustav. Hænel in the Roman edition of the "corp. jur. civ antej." 1842. This is the critical edition, and is enriched by the new discoveries above alluded to made in Milan and Turin.

Codex Justinianus of 529 A.D.

III. The Codex Justinianus was published in the year 529 A.D. It is not supplemental to the Codex Theodosianus as this latter code was to the Codex Gregorianus and the Codex Hermogenianus. In this work which was published scarcely two years after Justinian became emperor, the plan intended was, to include all that might be useful and practical from the earliest imperial constitutions in the time of Hadrian until the time of Justinian himself. This codex superseded the Codices Gregorianus, Hermogenianus, and Theodosianus, and contained not only the Leges generales, but also the *rescripta* of all the emperors from Hadrian to Justinian. The new constitution was published the 7th of April

529 A.D., and came into operation on the 21st of the same month. It was contained in twelve books, and was quite a distinct work from the codex contained in the body of legislation now known by the name of the "corpus juris civilis."

In the constitutio, "Hæc quæ necessario," of the 13th Feb., 528, in which the plan of the work was submitted to the senate, ten men are mentioned by name to whom this work was confided. Among them appears for the first time the illustrious name of Tribonian, but only as a simple member of the commission; the name of Theophilus the celebrated professor of law at Constantinople is also mentioned in this commission.

TITLE FIFTH.

LAW PROCEEDING FROM THE JURIS-CONSULTI, RESPONSA ET SENTENTIÆ PRUDENTUM.

SECTION XII.—*Law proceeding from the Juris-consulti in general:—Historical review.*

Historical Review.

I. In the first century of the Roman State there was no jurisprudence, no *science* of law, and no legal records or settled forms of process. The pontifices preserved in the arcana of their own minds the peculiar legal rules observed. They were the sacred hierarchs who held the keys of the mysteries, or rather the mirrors in which were alone reflected the indistinct and mysterious forms and observances of the law as then known and obeyed. The establishment of more certain rules by the introduction of the laws of the twelve tables did not entirely change this state of things.

The administration of justice and the esoteric doctrines relating to forms and legal process, were still surrounded by all the solemnities that could be invented or preserved by a powerful priesthood, a peculiarity which lasted uninterruptedly for several centuries. The *jus Papirianum* did not explore this realm of mystery; for it was merely a collection of the laws of the kings, and cannot be regarded as a scientific work on law. Of jurisprudence in the strict acceptation of the term, of civil process and of scientific jurists, in the early period of Rome, nothing can be said, as neither the one nor the other existed.

Appius Claudius.

II. Livy informs us that in the middle of the fifth century of the State, Appius Claudius disclosed the forms of action (*legis actiones*) and the days on which legal proceedings might lawfully be proceeded with or on which they must be deferred (*dies fasti et nefasti*) knowledge which had hitherto alone been possessed by the pontifices. Livy in the well-known passage properly treats this as an important discovery. It was, in his language, the publication of the *jus civile*, which had been hitherto hidden "in penetralibus pontificum."(*a*) Pomponius, also mentions this disclosure in the following passage: "Postea quum Appius Claudius proposuisset et ad formam redegisset has actiones, Cneius Flavius scriba ejus, libertini filius, *surreptum librum* populo tradidit; et adeo gratum fuit id munus populo, ut tribunus plebis fieret, et senator, et ædilis curulis. Hic liber, qui actiones continet, appellatur jus civile Flavianum, sicut ille jus civile Papirianum; nam nec Cneius Flavius de suo quidquam adjecit libro. (*b*) From Cneius Flavius this publication came to be called

(*a*) Liv. IX. 46 (*b*) L. 2. sec. 7. D. orig. jur. 1. 2.

jus Flavianum. Pliny also states that this knowledge of the mysteries of the law was obtained upon the advice of Appius, and through the attention of Flavius, who was his scribe, "cujus hortatu exceperat eos dies,"(*c*) This does not quite agree with the statement above quoted from Pomponius, in which he is charged with having stolen his information (*surreptum librum*). The general opinion, however, is that Appius Claudius Cæcus, a man of patrician rank, was the real author, and that Cneius Flavius was the person through whom the information was communicated to the people. One thing at least does not admit of the slightest doubt, that the discovery formed a most important epoch in the history of Roman jurisprudence, and that from this period the mysteries of the law no longer lay concealed in the breasts of the pontifices. It is supposed that the work of Flavius on the "*dies fasti*" and the "*dies nefasti*" was published by him upon his elevation to the curule ædileship. A further work was written by Appius Claudius entitled "de usurpationibus." In the time of Pomponius, who flourished under Hadrian, this work was only known by name. (*d*)

Tiberius Coruncanius

A second epoch occurred at the end of the fifth century, when a plebeian, Tiberius Coruncanius, was elevated to the rank of pontifex maximus. He made great alterations in the law by allowing any one of the populus who was qualified publicly to *respond*: that is, to give legal advice and opinions on previously submitted judicial questions.(*e*) "Et quidem (says Pom-

(c) Pliny His. Nat. lib. 33. c. 1. See also Cic. de Oratore I. 41. and Cic. ad Attic. VI. epis. 1. Puchta's Inst. vol. I. p. 314.

(d) See also Sells "Quellenkunde des Rom. Rechts," sec. 51. p. 8. Bonn, 1846.

(e) L. 2. secs. 35, 38. de orig. jur. 1. 2. Cic. de Orat. lib. III. 43.

ponius) ex omnibus qui scientiam nacti sunt, ante Tiberium Coruncanium publice professum neminem traditur; ceteri autem ad hunc vel in latenti jus civile retinere cogitabant, solumque consultatoribus vacare potius, quam discere volentibus se præstabant." Again he says—"Post hos fuit Tiberius Coruncanius, ut dixi, qui primus profiteri cœpit; cujus tamen scriptum nullum extat, sed responsa complura et memorabilia ejus fuerunt."

Jus Ælianum. In the middle of the sixth century the first really legal work appeared. This was the work of Sextus Ælius Catus who was consul in 556 and censor 560. Of him Pomponius says—"Augescente civitate, quia deerant quædam genera agendi, non post multum temporis spatium Sextus Ælius alias actiones composuit et librum populo dedit, qui appellatur *jus Ælianum*." (*f*) This work was said to be *tripertita*, or to consist of three parts. First, it contained the twelve tables: second, an interpretation of the laws of the twelve tables: and, third, a collection and explanation of the *legis actiones*. It is from this time that the Romans themselves reckoned that their jurisprudence properly commenced. Till this period the doctrines of the law, and the administration of justice belonged exclusively to the pontiff. Pomponius, in his interesting sketch of Roman legal history, says—"Sextum Ælium etiam Ennius laudavit, et extat illius liber, qui inscribitur tripertita; qui liber veluti cunabula juris continet. Tripertita autem dicitur, quoniam lege duodecim tabularum præposita jungitur interpretatio, idem subtexitur legis actio." (*g*)

(*f*) L. 2. de orig. jur. l. 2. (*g*) L. 1. sec. 38. id. l. 2.

III. At the end of the sixth century of the State, there arose a special class of men called juris-consulti, who made it the business of their lives to study the doctrines of the law, and from the knowledge obtained by their studies, derived an honourable support. These pursuits in the course of time came to be regarded as a step towards the magistracy. We must not, however, compare the pursuits and studies of these juris-consulti, with the studies and objects of ambition pursued by the jurists of the present day. The student of the law with us labours to become a successful advocate, and hopes to obtain a judgeship. This was not the case with the Roman juris-consulti. As the rule the Roman prætors were not juris-consults, but statesmen. The study of the doctrines of the law, was not absolutely necessary for the prætor; nor was the advocate essentially a jurist. Cicero, who was an advocate, contrasted himself with the juris-consulti. In the time of Cicero, at the end of the Republic in addition to great literary activity the principal duties of the juris-consulti were *respondere*, *scribere*, and *cavere*.

Rise of the Juris-consulti.

Respondere, as already explained, was to give legal opinions, and this was the special and essential occupation of the juris-consulti. It was one also of more importance, if possible, than with us; as in certain cases the party who appealed to a judex, or who, as it was technically expressed, ventured *in judicium*, if he appealed from the interdict of the prætor, was visited with heavy penalties. It was the orator that made the speech in court, the juris-consult did not appear either as patron or orator before the tribunal of justice.

Respondere.

The term *scribere*, related to the work which was done by the juris-consult, or by his scribe, under his direction, to use a modern term, as a kind of notary.

Scribere.

For example, the drawing up of wills and contracts, and the composition of other legal documents. (*h*)

Cavere.

The expression *cavere* was applied to the *cautelæ* and *clausula* or to the necessary cautions to be observed, and the operative words in contracts and other legal documents. But by far the most important part of the duty of the juris-consulti was included under what is implied by the term *respondere* (Licet consulere?—consule, Licebit.) (*i*) We are indebted to Cicero for much valuable information on all these points. In speaking of the juris-consulti, he usually treats them with great respect, but there is one passage in which he heaps mockery upon them, and expresses the most bitter scorn. In another, however, of his works, he is not so severe, and states that they were an important class of men. (*j*) At the end of this period the juris-consulti grew to much importance. They were, as already said, neither judges nor advocates, but when they agreed, or held a common opinion on a definite point of law, this was for all practical purposes regarded as binding. It was the *auctoritas juris peritorum.* The importance of their opinions on any point of the *jus civile* in which they were agreed, is plainly indicated by Cicero in his enumeration of the sources of the law. These he denotes as "leges, senatus-consulta, res judicatæ, *juris peritorum auctoritas*, edicta magistratuum, mos, æquitas." (*k*)

The classical period of the Roman law.

4. These *veteres juris-consulti*, as they were called by the Romans themselves, who lived in the two last centuries of the Republic, were men of distinguished abilities and attained to great authority. But by far

(*i*) Cic. de off. ii. 19.
(*j*) Cic. pro Mur. c. 12. Hor. Sat. II. 2. 192. Brisson de formulis III. ed. Franc. 1592, p. 331.
(*k*) Cic. de finib. lib. iv. 27.
(*l*) Cic. Topic. c. 5.

the most distinguished jurists, were those who flourished in the period of the empire extending from the time of Augustus to the Emperor Severus. During these two centuries the jurisprudence of Rome, attained to its greatest perfection. This was the epoch or age known as the classical, and it was then that the most distinguished of the Roman jurists flourished. A long chain of illustrious men succeeded each other, exhibiting a degree of mental power and learning that has called forth the admiration of succeeding ages. From Labeo under Augustus, to Paulus, Ulpian, and Modestinus, there was a succession of the most distinguished men, who for their acuteness, their ability to solve legal questions, and the terse elegance with which they could express legal ideas, may be taken as patterns by all future lawyers. They were not only great as theorists, but they were eminent as practical jurists. During the whole of this epoch, the theoretical was combined with the practical, and jurisprudence attained its culminating point in the history of the world. The records of this period furnish a sharp rebuke to those who suppose that a great lawyer is to be made by exclusive attention to practice and to rules of procedure. The union of the two elements, the practical and the theoretical, advanced these men to positions of great importance, and to elevated rank in the state. This was the case with both Ulpian and Paulus, both of whom obtained the high office of *præfecti prætorio*. The separation of the statesman from the lawyer was avoided at Rome, and the result was that on account of their profound study, and their incomparable abilities, the advice and opinions of these men had eventually as much authority as the law itself. The *veteres jurisconsulti* in their day possessed a growing influence, but

their opinions were not authoritative. Like the opinions of Cicero, they possessed great moral weight, but they were not legally binding. In the first century of the emperors a great change took place. The influence and the power of the jurists grew so rapidly, that at last these men attained the very summit of influence and of power—an influence possessed by the jurist at no other time and with no other people.

Decline of the Roman Law.

V. After the time of Severus, the brilliant period of classical jurisprudence so remarkable in the history of civilization was followed by a gloom the most profound. With the age of Ulpian, and of Paulus his contemporary, and that of Modestinus, the illustrious disciple of Ulpian, the giant race of jurists passed away. Modestinus closed the series, and no great jurist arose after his time. This period in its full development had extended over a space of about four centuries—the two closing centuries of the Republic, and the first two centuries of the empire. During the whole of this time great jurists succeeded each other exhibiting increasing brilliancy, until the power of the Roman intellect seemed to have exhausted itself in the person of Modestinus the last renowned lawyer of this race. After the time of Alexander Severus, and for the three following centuries, such was the exhaustion and darkness of the legal intellect, that it produced no great men and no new legal creation. During the reigns of Diocletian and of Constantine the writings of these lawyers obtained their greatest authority. From the period of Diocletian, the two great authorities for the jurist, were the *jura*, or the writings of former jurists, and the imperial constitutions. The *jura* remained as the alone sources of the law.

The "citation law" of Valentinian III.

At the commencement of the fifth century Rome was sunk so low that it was not in a condition to modify in any way the opinions of the great jurists. About the beginning of the year 426 Valentinian III established what Hugo, a German jurist, has named the "citation law" (Citirgesetz) a term which has since come into universal adoption with continental civilians.

This "citation law" was a singular conception, as the following account will shew. Valentinian III established a *collegium*, or commission of great deceased jurists, who were supposed to utter their grave opinions by means of their writings. For this purpose he selected five, namely, Gaius, Æmilius Papinianus, Julius Paulus, Domitius Ulpianus, and Herennius Modestinus. The writings of these five jurists were to be used for all purposes of practice, and to be regarded as official publications, or declarations of the existing law. If upon any point they differed the majority was to decide. If there were for example three for opinion A, and two for opinion B, the decision was for the opinion A, as the correct one. If one authority was silent, and the remaining four were equally divided, or if three of the authorities were silent, and the remaining two were divided, in both these cases the opinion that Papinianus defended prevailed. If Papinianus was silent and the authorities were equally divided then it was left to the judex to follow which opinion he pleased.

It was remarkable that Valentinian should have selected only five jurists out of the many who had flourished from the times of Augustus to his own. His selection of these five, and the prominence given to Papinian, was as though he had founded a commission, with Papinian for the president, giving to him

the casting vote. (*m*) This remarkable "citation law" was promulged in the following words: "Papiniani, Pauli, Gaii, Ulpiani, atque Modestini scripta universa firmamus ita, ut Gaium, quæ Paulum, Ulpianum et cunctos comitetur auctoritas, lectionesque ex omni ejus opere recitentur. Eorum quoque scientiam, quorum tractatus atque sententias prædicti omnes suis operibus miscuerunt, ratam esse censemus, ut Scævolæ, Sabini, Juliani, atque Marcelli, omniumque quos illi celebrarunt, si tamen eorum libri propter antiquitatis incertum codicum collatione firmentur. Ubi autem diversæ sententiæ proferuntur, *potior numerus vincat auctorum* vel *si numerus æqualis sit, ejus partis præcedat auctoritas, in qua excellentis ingenii vir Papinianus emineat,* qui ut singulos vincit, ita cedit duobus. Notas etiam Pauli atque Ulpiani in Papiniani corpus factas (sicut dudum statutum est) præcipimus infirmari. Ubi autem pares eorum sententiæ recitantur, quorum par censetur auctoritas, quod sequi debeat, eligat moderatio judicantis. Pauli quoque sententias semper valere præcipimus."

Set aside by Justinian.

Justinian subsequently decided that the method of this "citation law" was defective, and a violation of all principle, and ordered a selection to be made from the writings of all the great jurists; not only from the five eminent men just mentioned, but from the legal writings of the jurists contained in more than two thousand books, and by this famous collection, at present contained in the Pandects, the "citation law" of Valentinian III was superseded.

(*m*) Cod. Theo. l. 3. d. resp. prud. i. 4.

SECTION XIII.—*The Jus respondendi.*

Responsa prudentium in the strict sense.

We come now to the consideration of the *responsa prudentium*, in the strict and limited acceptation of the term. Although we possess a number of passages which throw light upon this subject, the *exact* time and means by which the juris-consulti obtained this authority is a problem which hitherto no one has been able to solve. In the days of the republic, and before the age of Augustus, there was no *jus respondendi* in the full and matured form in which it afterwards appeared; nor was there any special concession made to the *responsa*. The jurists were accustomed to make them, but they possessed no binding authority. These *responsa* consisted of information in respect to legal matters given orally by the juris-consulti before the tribunal, or presented by them in writing. Augustus first established this peculiar authority and as princeps ordained that the *responsa* should be made in writing, and that they should be handed in to the tribunal sealed. (*a*) Such *responsa* were binding on the judge, so far as they were not opposed by others similarly expressed and presented. The *responsa* are not to be considered as introducing principles entirely new, but simply as containing the strict and logical development of that which was actually acknowledged, and which already existed in the legal consciousness of the people. By the *responsa* the *jus civile* uttered its voice. Hence this deliberate mode of expression on the part of the *juris-consulti*, these *responsa prudentium*, were denoted in an especial manner by the name of *jus civile*, in the strict sense of the term.

(*a*) Scheurl Instit. p. 17.

What the edict of the prætor did for the development of the *jus gentium*, was now done by the responses of the juris-consulti for the *jus civile.* (*b*) This is the spirit of the remarks of Pomponius, who says, "His legibus (XII tab.) latis cœpit, ut naturaliter evenire solet, ut interpretatio desideraret prudentium auctoritate necessariam esse disputationem fori. Hæc disputatio et hoc jus, quod sine scripto venit, compositum a prudentibus, propria parte aliqua non appellatur, ut ceteræ partes juris suis nominibus designantur, datis propriis nominibus ceteris partibus; *sed communi nomine appellatur jus civile.*" (*c*) Again he says, "Ita in civitate nostra aut jure, id est lege constituitur, aut est *proprium jus civile, quod sine scripto in sola prudentium interpretatione consistit.*" (*d*) Again, Papinianus says, "*Jus autem civile est*, quod ex legibus, Plebiscitis, senatusconsultis decretis principum, *auctoritate prudentium* venit." (*e*)

Augustus grants the jus respondendi as an act of grace.

In the time of the Emperor Augustus the exclusive right to the *jus respondendi* was granted by imperial patent, and as an act of grace to the *juris-consulti.* The cardinal passage in which we find this related, is given by Pomponius in the following words: "Massurius Sabinus in equestri ordine fuit, et publice primus respondit, posteaque hoc cœpit beneficium dari a Tiberio Cæsare; hoc tamen illi concessum erat. Et ut obiter sciamus, ante tempora Augusti publici respondendi jus non a Principibus dabatur, sed qui fiduciam studiorum suorum habebant, consulentibus respondebant. Neque responsa utique signata dabant, sed ple-

(*b*) See Marezoll. p. 51.

(*c*) L. 2. sec. 5. l. 7. sec. 12. d. jus jure I. 1.

(*d*) Compare also Cic. de offic. III. c. 16. Festus sub voc. *receptum.* sec. 3. Ins. de jur. nat. I. 2.

(*e*) L. 7. pr. d. jus. et jure. I. 1.

rumque judicibus ipsi scribebant, aut testabantur, qui illos consulebant. *Primus Divus Augustus, ut major juris auctoritas haberetur, constituit, ut ex auctoritate, ejus responderent.* Et ex illo tempore peti hoc pro beneficio cœpit, et ideo optimus Princeps Hadrianus, quum ab eo viri prætorii peterent, ut sibi liceret respondere, rescripsit iis; hoc non peti, sed præstari solere; et ideo, si quis fiduciam sui haberet, delectari, si populo ad respondendum se præpararet. Ergo Sabino concessum est a Tiberio Cæsare, ut populo responderet, &c." (*f*) Thus, from the time of Augustus the *responsa prudentium* were made, as if in the name of the emperor himself, as Pomponius says, "*Ut ex auctoritate ejus responderent.*" This satisfactorily explains what Gaius says, that when the *prudentes* agreed, their opinion obtained as law—"*legis vicem optinet.*"

Testimony of Gaius.

That these jurists who had the imperial patent should have possessed so high an authority, and that these opinions should have gained such weight, as so strikingly recorded by Pomponius, seem to us, at least with our modern notions, an unaccountable arrangement. Gaius, however, distinctly states, that one of the sources of *jura* is *responsis prudentium* (*g*) to which he subsequently adds, that "Responsa prudentium sunt sententiæ et opiniones eorum quibus permissum est *jura condere*, quorum omnium si in unum sententiæ concurrant, id quod ita sentiunt, *legis vicem optinet.*" (*h*) Here it should be observed that "the answers of the jurisprudents were not merely the *decisions* and opinions of persons who were authorised to *determine* the law." They were more than this, for they constituted a legislative organ. As the prætors wrought upon the basis of the

(*f*) L. 2. sec. 47. d. orig. jur. I. 2.
(*g*) Gaius I. sec. 2.
(*h*) Gaius I. sec. 6, also Ins. Jus. sec. 8. (I. 2)

jus gentium, so the jurisprudent *founded* a new law upon the basis of the *jus civile*. The term "*condere*," as used by Gaius and Justinian, means more than *to determine*, it signifies *to found* and *to establish;* and this is the explanation given by distinguished continental jurists, who render it by the words *gründen, errichten*, which is agreeable to the use of the word by the Roman jurists. They apply it to the forming of *civitates, regna*, and to the establishing of a *testamentum*. The phrases they employ are "*civitates condi*," "*regna condita*," "*condidit testamentum*." (*i*) And hence, Justinian, in the "Constitutio Deo auctore," (*j*) and again in the "Constitutio tanta" (*k*) speaks of the "*responsa prudentium*" as a *source of law* that must be respected. In a word, they were *sententiæ* and *opiniones*, not only that determined concrete cases of litigation, but which based and established new laws.

Probably a collegium of juris-consulti.

I. Gaius, in the passage just quoted, introduces a rescript of Hadrian, in which he states, that if the juris-consulti agreed in their *responsa*, then, also, for other cases they should obtain the binding force of law; but that, if they did not thus agree, the judge was not to be bound. Gaius says, "Quorum omnium si in unum sententiæ concurrant, id quod ita sentiunt, legis vicem optinet; si vero dissentiunt, judici licet quam velit sententiam sequi: idque rescripto divi Hadriani significatur." (*l*) How was it to be known whether they all agreed? Although we have no information to enable us to answer this question with certainty, it has been suggested that a *collegium* or commission of juris-consulti existed by the appointment of the empe-

(*i*) Sec. 11. Jus. II. 1. L. 5. Dig. I. 1. L. 27. Cod. VI. 23.

(*j*) Const. Deo auct. sec. 4.

(*k*) Const. tanta. sec. 20.

(*l*) Gaius I. sec. 7.

ror, to whom controverted points were submitted, and that when this *collegium* was unanimous in its decision upon any point, this opinion was binding for all future cases, but that when there was not an unanimous opinion, the prevailing one, that is the opinion of the majority, had only moral and not legal force. If such an arrangement existed, it would not seem so strange that the opinions expressed unanimously by such a *collegium* of distinguished juris-consulti should be binding upon the judge. It should, however, be noted that there is not a trace in our authorities to sustain this hypothesis, although there is nothing to contradict it. It may be that the Roman writers are silent about this *collegium*, as it was an institution so simple and so well known. The "citation law" of Valentinian III would not seem so strange, if such a *collegium* of living jurists had already existed. Otherwise a *collegium* of deceased jurists pronouncing their opinions by their writings, was a strange and remarkable idea. The careful examination of the "citation law" contained in the Codex Theodosianus, will perhaps be found to add force to this hypothesis. (*m*)

Responsa signata.

II. Pomponius informs us that the *responsa* were *signata*. "Neque responsa utique signata dabant, sed plerumque judicibus ipsi scribebant, aut testabantur, qui illos consulebant. *Primus* Divus Augustus, &c." (*n*) It was the *responsa signata* that must be respected. When a continental jurist gives his opinion, it is usually given under his seal, and some persons have supposed that this custom has been derived from the Romans. But this notion of sealing was quite foreign to the Romans, and the meaning of *signata* is, that

(*m*) L. 3. Th. d. respon prud. I. 4. see above sec. 12.

(*n*) L. 2. sec. 47. d. orig. jur. I. 2.

the document containing the opinion was closed. It was a means of closing, as, for example, will hereafter be seen was also the case with the Roman testament. Thus, the *responsa* was to be delivered closed to the judge by means of a seal or seals, and the inquiring party handed it to the judge to be opened by him. In brief, it would appear, that a discussion must have taken place in the *collegium* of the *juris-consulti*, and that the opinion when arrived at was not disclosed to the party seeking it in the first instance, but presented, *signata* or closed, to the judge, who first communicated to the parties interested the opinions of the *prudentes*. This is considered as the correct explanation of the expression *responsa signata*.

Close of the jus respondendi.

III. When the race of great jurists ceased, this *collegium* must also have ceased, and it is probable that after the time of Severus the *jus respondendi*, had entirely disappeared. Still there is said to be a faint trace of it under Constantius, as a writer of that age mentions one Innocentius as possessing the *jus respondendi*. (*o*) But the exact truth is that after the time of the classical jurists the *jus respondendi* was really lost.

SECTION XIV.—*Of the different Schools or Sects of Roman Jurists.*

The scholæ juris-consultorum.

I. The *scholæ*, as Gaius names them, or sects of the Roman jurists, arose in the time of Augustus. Before the reign of this emperor, although diversities of opinion existed, there were no distinct sects. In the reign of Augustus, two great jurists flourished: Antistius

(*o*) Zimmerm. Rechts Geschichte 204. note 20.

Labeo, a scholar of Trebatius the son of Quintus, also a jurist, who had accompanied Brutus and Cassius to the battle of Philippi, and who after the loss of freedom would not survive the republic; (*a*) and Caius Ateius Capito, a scholar of Ofilus: these founded the two great sects of Roman jurists. Pomponius says, "*Hi duo primum veluti diversas sectas fecerunt.*" These two ornaments of the law were influenced in their views by the political circumstances of the times. (*b*) Labeo, as might be supposed, was a friend to the republic and opposed the ambition of Augustus. He was a profound philosopher and lawyer and resisted the flattering advances made to him by Augustus. Pomponius briefly marks their peculiarities; "nam Ateius Capito in his, *quæ ei tradita fuerant, perseverabat*; Labeo ingenii qualitate et fiducia doctrinæ, qui et ceteris operis sapientiæ operam dederat, *plurima innovare instituit.*" (*c*) An interesting portrait is preserved of Labeo, drawn by his opponent Capito, and preserved by Gellius. Capito says, "Labeonem legum atque morum populi romani jurisque civilis doctum apprime fuisse; sed agitabat hominem libertas quædam nimia et vecors, usque eo ut D. Augusto jam principe et rempublicam obtinente, ratum tamen pensumque nihil haberet, nisi quod justum sanctumque esse in romanis antiquitatibus legisset." (*d*)

Capito in political sentiment was quite opposed to Labeo, and this political bias exerted a great influence on the formation and early history of the two schools. As a politician he was not so highly esteemed as Labeo, but as a philosopher and learned man, he was

(a) Appian de bell. civ. IV. 135. See also Puchta Instit. vol. I. 445.
(b) Tac. Annal. III. 65.
(c) L. 2. sec. 47. d. orig jur. I. 2.
(d) A. Gellius N. A. XIII. c. 10 c. 12.

his equal, strictly interpreting the law as he had found it:—as Pomponius says, "*Quæ ei tradita fuerant perseverabat.*" In a word, as we express it, Capito kept to the letter of the law, whilst Labeo with greater freedom and unrestrainedness deduced his arguments from the nature and essence of things. (*e*) Gellius gives an interesting description of the mental status of Labeo. "Labeo Antistius juris quidem civilis disciplinam principali studio exercuit, et consulentibus de jure publice responsitavit, ceterarum quoque bonarum artium non expers fuit, et in grammaticam sese atque dialecticam literasque antiquiores altioresque penetraverat, latinarumque vocum origines rationesque percalluerat, eaque præcipue scientia, *ad enodandos plerosque juris laqueos utebatur.*" (*f*)

Names of the schools and their origin.

II. Both of these men gathered around them a troop of *auditores*, amongst whom were men of the greatest ability; hence there arose two distinguished sects or schools of jurists, which were named not after the founders themselves but after two of their most illustrious scholars. The school of Capito took its name from his disciple M. Sabinus: "Et ita Ateio Capitoni Massurius Sabinus successit . . . Massurius Sabinus in equestri ordini fuit, et publice primus respondit:" (*g*) whilst the doctrines of Labeo were defended by Nerva, who was succeeded by Proculus, from whom the school of Labeo was named. These great men and their successors were the means of continuing for a long time the distinctions, and we may add the disputes, of these sects. Pomponius again says, "*Labeoni Nerva (successit) adhuc eas dissentiones auxerunt. . . . . Nervæ*

(*e*) Marezoll Instit. p. 67. Annal. III. c. 70. Macr. Saturn. 7. 13.
(*f*) A. Gel. XIII. c. 10. X. 20. Tac. (*g*) L. 47. d. orig. jur. I. 2.

successit Proculus. Fuit eodem tempore et Nerva filius. (*h*) Thus two schools of jurists were founded which flourished for nearly two hundred years, the schola Proculianorum (or Proculeianorum), which represented the opinions of Labeo, and the schola Sabinianorum or Cassiana, named after Massurius Sabinus and Cassius Longinus, which inculcated and defended the opinions of Capito. The bias of the two sects was similar to that of their respective masters. The Sabinian school clung to the letter of the law: to the objective external proof, and in their controversies show great acuteness. The Proculians used greater freedom and derived arguments from the nature, the appropriateness, and utility of the law itself. This perhaps does not exactly agree with Pomponius, who says of Labeo, the founder of this school, "Labeo ingenii qualitate et fiducia doctrinæ, qui et ceteris operis sapientiæ operam dederat, plurima innovare instituit, (*i*) but it expresses the essential characteristic of his school.

Distinguished jurists of both schools.

III. Pomponius, in the lex II. "de orig. jur.," so often quoted, gives a list of the most distinguished men of both the schools, from their very commencement till his own time, and there is no reason to doubt the accuracy of his account. To the Proculian school belonged not only Nerva the father, but a son of the same name—"Fuit eodem tempore Nerva filius"—who became distinguished at the early age of seventeen years, at which youthful period he made legal *responses* —"qua ætate (annis decem et septem) aut paulo majore fertur Nerva filius et publice de jure responsitasse" (*j*)

(*h*) L. 47. id.
(*i*) L. 2. sec. 47. d. orig. jur. I. 2.
(*j*) L. 2. sec. 47. d. orig. jur. I. 2. L. 1. sec. d. postul. III. 1

— Pegasus, Celsus the father, Celsus the son, and Neratius Priscus. To the Sabinian school belonged Massurius Sabinus, after whom the school was named; Caius Cassius Longinus, from whom the name Cassiana was derived; Cælius Sabinus; Priscus Javolenus; Aburnus; Valens; Tuscianus; and Salvius Julianus, the great jurist who compiled the Edict. "Nervæ (says Pomponius) successit Proculus. Fuit eodem tempore et Nerva filius. Fuit et alius Longinus ex equestri quidem ordine, qui postea ad Prætoram usque pervenit. *Sed Proculi auctoritas major fuit*, nam etiam plurimum potuit, appellatique sunt partim Cassiani, Proculiani; quæ origo a Capitone et Labeone cœperat. Cassio Cælius Sabinus successit, qui plurimum temporibus Vespasiani potuit; Proculo Pegasus, qui temporibus Vespasiani Præfectus Urbi fuit; Cælio Sabino Priscus Javolenus; Pegaso Celsus; patri Celso Celsus filius et Priscus Neratius, qui utrique Consules fuerunt, Celsus quidem et iterum; Javoleno Prisco Aburnus Valens et Tuscianus, item Salvius Julianus." (*k*)

Gaius omitted

In the above enumeration the name of Gaius does not appear, and for this two reasons may be assigned. One is that Pomponius wrote in the time of Hadrian, which was before the period of Gaius; the other is that Gaius did not live in Rome and was probably a provincial jurist. That Gaius belonged to the Sabinian school he himself often affirms. When speaking of this school he uses the phrases "*nostri præceptores*," "*nostræ scholæ auctores*," whilst when speaking of the jurists of the Proculian school, he uses the phrase *diversæ scholæ auctores*." (*l*)

(*k*) L. 2. sec. 47. d. orig. jur. I. 2.

(*l*) See especially on the distinction of the sects, Dirksen "Beiträge zur Kunde des röm. Rechts." Abtheilung I.

Decline of the schools.

IV. After the time of Antoninus Pius and Pomponius the distinction between the schools lost its importance and the brilliant men of the succeeding age belonged to neither of the schools. Such was the case with Papinianus, Paulus, and Ulpian who flourished in the time of Severus. They were attached to neither of the sects, and the school controversies of the former age so keenly discussed ceased to be of importance. Many of the distinctions and disputes of the Proculians and Sabinians, originating as they probably did mainly in political causes, are even now very interesting, as we find them preserved in the pages of Gaius and the Pandects.

Section XV.—*Of the Literary Activity of the Roman Jurists.*

In the time of the Republic.

I. In the early period of Rome no literary activity manifested itself among the jurists in relation to the science of law. Jurisprudence as a science did not exist; and we find nothing similar to that zeal in the study of the law which so strikingly characterized the Roman lawyers in subsequent ages. It was not till the sixth century of the state, that there were indications of that literature which so brilliantly illuminated future times. In the first half of this century appeared the *jus civile Papirianum*, a collection of the *leges regiæ*; the *jus civile Flavianum*, a work on the *formulæ*; and the *jus Ælianum*, which may be regarded as a second part of the last-named work. But at the close of the sixth century came the two Catos—Marcus Porcius Cato, surnamed Censorinus, who was consul 559,

censor 570, and who died 605. He was the "princeps Porciæ familiæ" and renowned as a statesman, an orator, and a jurist. His son also worthily succeeded him Marcus Porcius Cato, known as Cato the younger, to distinguish him from his father, who is called the elder Cato. "Deinde (says Pomponius) Marcus Cato, princeps Porciæ familiæ, cujus et libri extant; sed plurimi filii ejus, ex quibus ceteri oriuntur." Aulus Gellius and Festus mention both these great men. (*a*) At the beginning of the seventh century flourished M. Manilius Nepos, M. Junius Brutus, and *Publius* Mucius Scævola who was consul in 621 and pontifex maximus in the 623rd year of the state. The last is not to be confounded with Q. Mucius Scævola, who was son of the above Publius Mucius Scævola. The writings of the father were much quoted and are mentioned by Cicero. Of these three lawyers Pomponius says, that they had written many books on the *jus civile*, and laid the foundation for its scientific exposition. "Post hos (*i. e.* the Catos) fuerunt Publius Mucius et Brutus, et Manilius *qui fundaverunt jus civile*. Ex his Publius Mucius etiam *decem* libellos reliquit, Brutus *septem*, Manilius *tres*; et extant volumina scripta Manilii monumenta. Illi duo consulares fuerunt Brutus prætorius, Publius autem Mucius etiam pontifex maximus." (*b*) In the middle of the seventh century flourished *Quintus* Mucius Scævola, who wrote upon the whole *jus civile* in eighteen books. He was a most distinguished jurist, and the son of Publius Scævola, already mentioned. The Roman law was first

(a) L. 2. sec. 38. d. orig. jur. I. 2. A. Gell. Noc. At. XIII. 10. Festus d. verb. sig. sub voce Mundus. See also sec. 12 above.

(b) L. 2. sec. 39. d. orig. jur. I. 2. Cic. de Orat. I. 56. II. 55. Cic. pro Cluentio. c. 51. Topica. 4. 8.

systematically treated by him. As Pomponius expresses it "Quintus Mucius, Publii filius, pontifex maximus, *jus civile primus constituit*, generatim in libros XVIII redigendo." (*c*) Later Roman jurists wrote commentaries on this book of Quintus Mucius Scævola. Pomponius himself wrote thirty-nine books on the work of Scævola entitled "ad Quintum Mucium." Modestinus also wrote "ad Q. Mucium," from which it is evident that Mucius was treated as the coryphæus of the law.

Servius Sulpicius.

At the close of the seventh century A.U.C., Servius Sulpicius Rufus flourished. He is often mentioned by Cicero as the *princeps* of juris-consults. This great man held it to be a disgrace for a noble not to be a jurist—"turpe esse patricio et nobili et causas oranti jus, in quo versaretur, ignorare." He left behind him one hundred and eighty *libri* on the law, and was the first who wrote upon the Edict. (*d*) We have no quotation from the writings of Servius Sulpicius himself in the Digest, but his opinions are often referred to by the jurists whose works are extracted in the Pandects. Servius Sulpicius was a scholar of C. Aquilius Gallus, who was a contemporary of Cicero and prætor in the year A.U.C. 688. Sulpicius was also a close personal friend of Cicero and is often mentioned by subsequent jurists. The formulæ of Aq. Gallus were regarded as very important, and were named after him as *stipulatio aquiliana*, and *postuma aquiliana*.

Aulus Ofilius.

Another distinguished juridical writer of this period was Aulus Ofilius. He was a younger contemporary of Cicero, and was the first who wrote a detailed com-

(*c*) L. 2. sec. 41. d. orig. jur. I. 2. See also Puchta's Inst. vol. I. pp. 441, 442.
(*d*) L. 2. sec. 43. d. orig. jur. I. 2.

mentary on the Edict. Serv. Sulpicius, just mentioned, had written only a short work in two books. Hence Pomponius gives prominence to the work of Ofilius as the first work of real importance on the Edict:—"Ofilius .... fuit Cæsari familiarissimus, et libros de jure civile plurimus, et qui omnem partem operis fundarent, reliquit; nam de legibus Vicesimæ primus conscribit, de jurisdictione; *idem edictum prætoris primus composuit* nam ante eum Servius duos libros ad Brutum perquam brevissimos ad edictum subscriptos reliquit." (*e*) The last writer to be mentioned in this period is Alfenus Varus, also a contemporary of Cicero, who was consul, and probably one of the many *suffecti* under Augustus. He wrote forty libri Digestorum and there are fifty-four extracts from these treatises to be found in the Digest of Justinian.

Alfenus Varus.

From the above brief sketch, it is clear that in regard to literary exertion, the Roman Jurists were by no means inactive during the period of the Republic.

Writings of the jurists in the times of the Emperors.

II. In the times of the emperors the writings of the jurists were immeasureably more important than in the preceding period of the Republic. Especially was this the case, as has been already indicated, during the first two centuries of the empire. From the reign of Augustus till Severus was the culminating time of the Roman jurists. During this period a variety of works treating the law from different points of view were written by the renowned classical jurists who adorned that brilliant age. These works can only be briefly referred to.

Commentary and Interpretation.

1. Not a little was written which consisted of commentary on the entire Roman legal system. This was

(*e*) L. 2. sec. 44. d. orig. jur. I. 2. and note *p*.
See also Puchta's Inst. vol. I. p. 2, 44

pursued by two methods. The one was that of *commentary* and *digest*, the other that of *interpretation*. As the basis for the commentaries of the classical jurists the "*libri tres juris civilis*" are deserving of especial notice. This was a work written by the renowned Massurius Sabinus, and its form and plan is supposed to have been the same as that of the "*libri XVIII juris civilis*" of Scævola, already mentioned. Upon opening the Pandects we meet at once with extracts from commentaries upon this great founder of the ~~Proculian~~ school. Thus we find at least thirty six "libri ad Sabinum" by Pomponius; by Ulpianus, at least fifty-one books; by Paulus, at least forty-seven books. The expression "Sabiniani libri" is sometimes used as an equivalent for "libri Ulpiani quos ad Mas. Sabinum scripsit." (*f*) Thus the importance of the "libri tres" of Mas. Sabinus who lived and flourished in the reigns of Tiberius and Nero can scarcely be over-estimated. (*g*)

Libri digestorum.

Again, under the name of *digesta*, a term indicating order and arrangement, numerous treatises were written. We have seen that Alfenus Varus wrote in the time of Cicero "*XL libri digestorum.*" Julianus, under Hadrian and his successors, Marcellus under Antoninus Pius, Marcus Aurelius, and Commodus, Celsus and Quintus Cervidius Scævola, who was the instructor in law of Septimius Severus, and of Papinian, also wrote "*XL libri digestorum.*"

This Quintus *Cervidius* Scævola is not to be confounded with Quintus *Mucius* Scævola, the son of Publius, who is mentioned so often by Cicero.

Exegesis

A second favourite mode of literary activity was that of *exegesis* and *interpretation*. Hence we find nu-

(*f*) L. 3. Cod. VI. 40. Compare Cod. III. 33. L. 14. Cod. III. 34. L. 14. Cod. VI. 24. See also L. 17.

(*g*) Gaius II. sec. 218.

merous exegetical works on the various sources of the law. Interpretations of the laws of the twelve tables, as one by Labeo: Gaius also wrote "*ad legem duodecim tabularum*," many extracts from which are to be found in the Pandects. Rich commentaries were also written on the prætorian Edict. These appeared after the time of Salvius Julianus, and are entitled "*ad edictum.*" More than one-half of the Pandects is made up of extracts from the great writers who commented upon the Edict. The Edicts also of the ædiles were thus commented upon, as for example both Cælius Sabinus, who was consul in A.D. 69 and flourished under Vespasian, and Gaius wrote "*ad edictum ædilium curulium.*" Ulpian and Paulus also wrote under the same title. Gaius again wrote on the provincial Edict, "*ad edictum provinciale*," several extracts from which are found in the Pandects. Ulpian, Paulus, Terentius Clemens, Gaius, Mauricianus and Marcellus wrote exegetically "*ad legem Juliam et Papiam.*" Paulus, especially, wrote exegetically on the various senatus-consulta, and in this manner all the most important topics of the law were explained by the great jurists. The explanation and illustration of the original sources of the Roman law was a favourite employment with the jurists. In this work they manifested the greatest activity; and the result of their efforts in the way of explanation and interpretation often gave rise to, and developed, new legal doctrines.

Annotated editions of earlier legal writers.

2. Again, the writings of the elder jurists were revived in a variety of ways. It was a kind of piety in the great classical jurists, not to allow the ancient masters of the law to slumber in forgetfulness. Their writings were re-edited and presented with notes of an explanatory character or criticisms of a polemical

nature were written upon them. The latter was indeed a favourite mode of writing. Thus the writings of Quintus Mucius Scævola were re-edited, and we find both Modestinus and Pomponius "*ad Quintum Mutium.*" The writings of Plautius were also re-edited, and are frequently quoted in the Pandects; hence we find very often Paulus "*ad Plautum,*" Pomponius "*ex Plautio.*" So also the writings of Marcellus, Sabinus and Papinianus, were repeatedly referred to, commented upon and reviewed; and we find Ulpianus, Paulus and Pomponius "*ad Sabinum,*" Paulus "*in notis ad Papin. Quæstiones,*" "*Papiniani quæstionum,*" "*responsorum Papiniani.*" Ulpianus, also, "laudat Papinianum et recitat verba Papiniani." It is thus evident that the greatest of the Roman jurists were not above this kind of work, and employed their great powers largely in annotation and commentary upon the ancient sages of the law. Under the head of commentary, as for example "*ad Quintum Mutium*" and "*ad Sabinum,*" we are not to understand mere brief and disconnected notes, but careful comprehensive connected treatment or paraphrase of the writings of these authors. It was in this manner that the writings of Scævola, Sabinus, and others formed the basis or texts for the great commentaries of the later jurists.

Epitomes.

3. A third mode of treating the law was by means of Epitomes, in which the useful and practical parts of the law were extracted from the early jurists and published in a distinct form. These epitomes were numerous, and amongst them we find by Javolenus "*posteriorum a Javoleno epitomatorum sive posteriorum;*" also Proculus "*ex posterioribus Labeonis;*" again Paulus, Labeo πιθανών (*a Paulo epitomatorum*). We find also by Paulus "*epitomarum Alfeni* (*digestorum*), sive

Alfenus (Varus) lib. . . . dig. (*a Paulo epitomatorum*) sive Alf. lib. . . . . *epitomarum.*" From the works of Labeo himself we find no extract in the Pandects, but from the epitome of Labeo several extracts may be gleaned. We may thus sum up what has been so far said, as to the literary activity of the Roman jurists, by adding, that the favourite mode of treating the writings of the early jurists, was by means of *Notes*, *Commentaries*, and *Epitomes*.

Monographs. 4. Numerous Monographs were also written; that is, independent treatises on distinct branches of the law; as, for example, on mortgages, on legacies, on testaments, and on servitudes. Gaius, Ulpianus, Paulus and Modestinus are especially distinguished by writing monographically, and hence their writings are of so much importance upon the branches of the law which they have discussed in this mode. Thus we find Gaius "*de legatis*," "*de testamentis*," "*de formula hypothecaria*," "*de operis novi nuntiatione;*" Ulpianus "*de adulteriis*," "*de appellationibus*," "*de causibus*," "*de sponsalibus*," &c.; Paulus, "*de conceptione formularum*," "*de dotis repetitione;*" Modestinus "*de inofficioso testamento*," "*de manumissionibus*," "*de ritu nuptiarum.*" These are only specimens of the important topics upon which Monographs were written.

Cases. 5. A very important mode of writing was that of collating the discussions and legal opinions which had been given on practical cases. The most renowned Roman jurists frequently wrote in this way. Some of these cases were real, others were undoubtedly feigned. Thus Gaius wrote according to this method, "*de casibus*," and Modestinus "*de enucleatis casibus;*" from these works we have many extracts in the Pandects. The names given to treatises of this kind are, *libri*

epistolarum, as by Pomponius; *epistolæ*, *responsorum* and *casus*.

Disputationes.

6. Again, there were legal treatises in which a single question was thoroughly sifted and examined on all sides. Collections of these treatises were made, and the errors of contemporary and older lawyers were exposed. Jurists of different periods wrote in this manner, and different names were given to such works; as, for example, *disputationes*, *questiones*, and *pandectæ*.

Pandectæ vel Digesta

The term *pandectæ*, with the early Roman jurists was employed in a sense different to that given to it by Justinian. With Justinian *pandectæ* or *digesta* is the official name for the fifty books containing the complete system of jurisprudence, as composed of numerous extracts taken from the great jurists. But the lawyers of a former period used this term to denote the treatment and thorough examination of a single legal point. Thus Heineccius remarks, in explaining the term *Pandectas vel Digesta*, "*Digestorum* vocabulum jam olim jureconsultis familiarissimum fuit exstiterunt *Digesta* Juliani, Alpheni Vari, Juventii Celsi, Ulpii Marcelli, Cervidii Scævolæ, Pauli. Ita vero vocati sunt libri, *quibus decisiones et disputationes juris continebantur*, ac veluti digestæ erant. Bertrand de jurispr. I. 1. Ita et *Pandectas* scripsere Ulpianus et Modestinus." (*h*) To this species of writing Paulus applies the title *manualium*, or again *de variis lectionibus*. Gaius has the title *rerum quotidianarum sive Aureorum*; Julianus, *de ambiguitatibus*; and Neratius, *membranarum*. The work of Neratius was excellent, and the jurist of the present age is more than glad when he finds an extract from the *membranæ* of this writer.

(*h*) Heineccii Antiquitatum Romanorum ed. Mühlenbruch prœmium, sec. 29 and note *n*.

Text books.

7. Short text books and compendia were also composed according to different methods for the purpose of instruction in the principles and elements of the Roman law. Of this kind were the *Institutionum libri* or *Commentarii* which gave a full development of the law. The most renowned of these were those of Gaius—"*Gaii institutionum commentarii quatuor.*" But Paulus, Marcianus, and Florentinus wrote treatises entitled *Institutionum.* The work of Gaius and Florentinus form the basis of the Institutes of Justinian—"*Institutionum D. Justiniani libri IV.*" There were also text books of the law in a more aphoristic form, and these were called *libri definitiorum*, and *libri sententiarum.* Ulpianus wrote in this manner; and his "*Fragmenta,*" as they are now termed, and which we still possess, are a valuable relic of the Roman law, quite remarkable for their simple, condensed, and pure style, containing extracts from the "*Libri singulares regularum*" of this great lawyer. Thus also the "*definitiones*" of Papinianus, and the five books "*sententiarum*" of Paulus, present the principles of the Roman law in the form of maxim and aphorism. In a word, in Gaius and the writers of his class, the doctrines of the Roman law are fully developed; in the "*Fragmenta*" of Ulpian, and the "*Receptæ sententiæ*" of Paulus, the same doctrines are presented as a collection of terse maxims.

Characteristics of the juridical writers.

III. When we examine the writings of the classical jurists of this period we are struck by their possessing two principal peculiarities, marked features which we may designate as emphatically their own. They are great as interpreters of the law. They are great as casuists. In the art of interpretation, that is in the development of a legal proposition, and the construc-

tion of new rules from this development, the Roman jurists exhibited most wonderful power. We may learn much from them in this respect. They could seize upon an established principle and apply it with ease and facility, or they could deduce from it a new proposition or a new doctrine with a promptness that has been attained by the jurists of no other age and no other country. And then, again, in regard to their casuistry, or the decision of practical cases, these they discussed with the most wonderful rapidity and in the fewest possible words. A question is sometimes put, and its solution given with such aphoristic brevity, that it is often difficult to reconstruct the connecting links, or propositions that have been removed. The modern method of giving an opinion is to present it, with all its members. We rear an edifice and hand it over to its owner without removing the scaffolding. And perhaps it is well that an unsymmetrical and inelegant structure should be sometimes thus concealed. The Romans presented only results, they pulled down the scaffold, and if the opinion or doctrine was to be respected, and permanently to remain, it must be as the raising of a column, or the adding of a frieze, or the chiselling of a capital in the great legal structure always in contemplation before the mind of the jurist. Of all modern writers on jurisprudence Cujacius most resembles the Romans in this striking and difficult characteristic of condensed and elegant brevity.

In the systematic exhibition of the law, the Romans were, comparatively speaking, very feeble. In this respect they are greatly excelled by the moderns. Hence their definitions are often incorrect, and cannot be relied on. Apart from the intrinsic difficulty of definition itself, they seem to have had no clear

conception of its nature as requiring the indication of the genus, and the specific differentia. Their attempted definitions are often mere descriptions, or pictures, rather than scientific expositions of the terms they endeavoured to mark out. Again, in regard to their etymologies, they certainly cannot be trusted; these if received, would lead to conclusions involving fundamental errors, whilst at times they are trifling, and even puerile. In regard to the language of the jurists of the classical period, upon the whole it is the pure Roman language. It is not, indeed, to be compared to the language of Cicero; but the student who has studied the language of Ulpian cannot fail often to be charmed with its terseness, its comprehensiveness, and its neatness of diction.

Section XVI.—*Legal Instruction.*

In the earlier times.

I. In the early times of Rome and even to the closing years of the Republic there was no settled plan of legal instruction at Rome, and there were no instructors who taught *ex professo*. At certain times however, and especially on solemn public occasions, the great jurists made their responses, and their friends and admirers gathered around them that they might listen to their opinions, and in this way become initiated into the doctrines of the law. Thus Cicero says of Quintus Mucius Scævola, "juris civilis studio multum operæ dabam Q. Scævolæ, P. F. *qui quamquam nemini se ad docendum dabat, tamen consulentibus respondendo studiosos audiendi docebat.*" (*a*) In another passage Cicero speaks

(a) Cic. ad Brut. 89. 41. 42. Amic. VII. 19. I. de legibus. I. c. 4. and ad famil.

of the facility there was for obtaining an acquaintance with the law, without any formal method of instruction. "Omnia sunt enim posita ante oculos, collocata in usu quotidiano, *in congressione hominum atque in foro*, neque ita multis literis aut voluminibus continentur. Eadem enim sunt elata primum a pluribus, deinde paucis verbis commutatis etiam ab iisdem scriptoribus scripta sunt sæpius." (*b*) So also, especially, when Labeo and Capito delivered their responses, their admirers gathered around them not only for amusement but for instruction, and the assembly partook somewhat of the nature of a school.

The professors of the law.

But it was in the early times of the emperors that there arose a distinct order of the "*professores juris civilis*," and of these Ulpian speaks in the following terms: "Proinde ne juris quidem civilis professoribus jus dicent; est quidem res sanctissima civilis sapientia," etc. Again: "Sed et si comites salarium petant, idem juris est, quod in professoribus placet." (*c*) From the "*Vaticana Fragmenta*" we also learn that a regular class of teachers had arisen: "Neque geometræ, neque *hi qui jus civile docent*, a tutelis excusantur." (*d*) Aulus Gellius also, probably in his youth, under Pius or Hadrian, remembered instruction having been given on legal questions. He says: "In plerisque Romæ stationibus jus publice docentium aut respondentium." (*e*) The Roman *statio* was the place apart from the residence where business was carried on, like the German *Stand;* and similar distinct places were possessed by the teachers of the laws, in which they imparted a knowledge of jurisprudence.

(*b*) Cic. de orat. L. 43.
(*c*) L. sec. 5. sec. 8, d. extra. cog. L. 13.
(*d*) Vat. Frag. sec. 150.
(*e*) Gell. N. A. XIII. 13. See also Puchta Inst. I. 430 and notes *k*, *l*, *m*.

The school at Berytus.

A complete revolution, however, took place in the method of legal instruction. Means for training youths as jurists were employed quite unknown to the *veteres juris-consulti.* Text books were written by the most eminent men—for example, by Gaius, Florentinus, Ulpian, and Paulus. At the end of the classical period of Roman Law, in the middle of the third century, we find that organized legal schools existed, with legal faculties, where a regular plan of instruction was pursued. The school of Berytus, in Phœnicia, was the earliest of those in which a prescribed course of instruction was given, from which institution sprung the celebrated schools, both of Rome and of Constantinople. A constitution of Diocletian exists in the codex addressed to "Severino et ceteris scholaribus Arabiæ," from which we derive this interesting information: "Quum vos affirmetis liberalibus studiis operam dare, *maxime circa juris professionem*, consistendo in civitate Berytiorum provinciæ Phœnices, providendum utilitati publicæ et spei vestræ decernimus, *ut singuli usque ad vicessimum quintum annum ætatis suæ studiis non avocentur.*" (*f*)

Law schools limited to Berytus, Rome and Constantinople.

The school at Berytus obtained marks of the imperial favour, not only from Diocletian, but subsequently from Justinian. In the patent put forth by the emperor upon the publication of the Pandects, entitled "*Deo auctore,*" sec. 7, Justinian ordained that the school in Berytus, and the schools in the royal cities of Rome and Constantinople, should be the only legal institutions, whilst those which had sprung up in Alexandria and other places should be suppressed. "Hæc autem (says the emperor) tria volumina

(*f*) Cod. qui ætate se exc. X. 49.

(referring to the Institutes, the Digest, and the Codex) a nobis composita tradi iis *tam in regiis urbibus, quam in Berytiensium* pulcherrima civitate, quam et legum nutricem bene quis appellet, tantum modo volumus; quod jam et a retro principibus constitutum est, et non in aliis locis, quæ a majoribus tale non meruerint privilegium; quia andivimus etiam in Alexandrina splendidissima civitate, et in Cæsariensium, et in aliis quosdam imperitos homines devagari et doctrinam discipulis adulterinam tradere, quos sub hac interminatione ab hoc conamine repellimus, ut si ausi fuerint in posterum in hoc perpetrare, et extra urbes regias et Berytiensium metropolim hoc facere, denarum librarum auri pœna plectantur, et rejiciantur ab ea civitate, in qua non leges docent, sed in leges committunt."

Constitutiones "Deo auctore" and "Tanta."

Such is the explanation given by Justinian himself, in relation to the different schools at the period of the publication of the Pandects, in the patent or constitution addressed to the *antecessores*, or the faculty of law. It may be as well again to mention here the two constitutions, so often referred to, placed immediately before the Digest or Pandects. The first of these, addressed to Theophilus, to Dorotheus, to Theodorus, and other professors of the law, commencing with the words, "Omnem reipublicæ nostræ sanctionem," and announcing to them the publication of the Institutes, the Pandects, and the Codex, is usually quoted and referred to as the "*Constitutio Deo auctore.*" The second *constitutio*, addressed "Magno Senatui populique, et universis orbis nostri civitatibus," and beginning with the words, "*Dedit nobis Deus,*" or in the Greek text appended to it with the words Δεδωκεν ἡμῖν ὁ Θεὸς is quoted as the "*Constitutio Tanta.*"

Studies in the law schools before Justinian.

II. In the "*Constitutio Tanta*" just mentioned, Justinian presents us with full information as to the plan of studies in the legal schools of his own and of the past age. From this account we also learn what these schools had been for the period of about three centuries before his reign. As to the time devoted to the study of the law by the rising jurists, it appears to have been a *quinquennium*, or a period of five years. The materials of the law to be wrought up were

First year's study.

divided as follows:—In the first year the subjects of study were the "Institutes of Gaius" and the four "*libri singulares*," which treated of the *dos*, *tutela*, *testamenta*, and *legata*. The students of this first year were ridiculously called DUPONDII, which Heineccius explains as "*quasi nullius pretii homines*." (*g*) In describing the first year's course of study, Justinian states, " . . . Gaii nostri Institutiones et libri singulares quatuor, primus de illa vetere *re uxoria*, secundus *de tutelis*, et tertius nec non quartus *de testamentis* et *legatis* connumerabantur; quos nec totos per consequentias accipiebant, sed multas partes eorum quasi supervacuas præteribant. Et primi anni hoc opus legentibus tradebatur non secundum Edicti perpetui ordinationem, sed passim et quasi per saturam collectum, et utile cum inutilibus mixtum, maxima parte inutilibus deputata."

Second year's study.

In the *second* year the students read the "*prima pars legum*." These are the words of Justinian, and there are some doubts as to what is exactly intended by this phrase. A portion also of the edict entitled "*de judiciis*," and a part entitled "*de rebus*," was studied. These were portions of the prætorian edict, the edict being di-

(*g*) Hein. Rom. Ant. Proem. sec. 45.

vided into seven parts. The "*prima pars*," the part "*de judiciis*," and the part "*de rebus*" were extracts from the three first parts of the Julian edict. This included probably rather less than the half of the edict with the commentary thereon. The students in the second year were called EDICTALES. (*h*)

Third year's study.

In the *third* year the *pars* "*de judiciis*" and the *pars* "*de rebus*," not completed in the previous year, were resumed and finished. In addition to these, a part also of the responses of Papinian was read. But as the rule, only eight out of the nineteen were the subject of study, and the students were called technically PAPINIANISTÆ. This period of the students' curriculum was deemed of much importance, and was inaugurated by a festival called the *Papinian feast.* In regard to this year Justinian says, "*In tertio autem anno* quod ex utroque volumine, *id est de rebus vel de judiciis, in secundo anno non erat traditum,* accipiebant secundum vicissitudinem utriusque voluminis, et ad sublissimum Papinianum ejusque Responsa iter iis aperiebatur. Et ex prædicta Responsorum consummatione, quæ decimo et novo libro concludebatur, *octo tantum modo libros accipiebant; nec eorum totum corpus iis tradebatur,* sed pauca ex multis, et brevissima ex amplissimis, ut adhuc sitientes ab iis recederent."

Fourth year's study.

In the *fourth* year, another kind of instruction was pursued intended to qualify for practice. And with this object in view the *Responsa* of Paulus were placed in the hands of the students. Justinian says, "Pauliana Responsa per semetipsos recitabant." These were not exegetically explained, but the students were expected to solve the cases contained in the "*Pauliana*

(*h*) For the full account see the Cons. Deo auct.

Responsa" themselves. This was done of course under the guidance of their instructors. The students in this year were called λύται (*lytæ*) as having ability to solve legal questions. As Juvenal distinctly explains it in Sat. VIII. v. 50—

"*Qui juris nodos legumque ænigmata solvunt.*"

Others have explained this as if the λύται were so called as being freed from the restraints of the legal school. The former explanation however is the correct one. Heineccius observes upon this as follows: "Quarto anno Responsa Pauli in manibus erant, eaque tunc ipsi recitabant, et tum dicebantur λύται, *quasi solvendis quæstionibus idonei.* Unde errant, qui λύτας vertunt *solutas*: sic enim dici debuissent λύτοι. (*i*) The fourth year completed the course of study as far as related to the ancient jurisprudence and hence Justinian says: "Et hic erat in quartum annum omnes antiquæ prudentiæ finis, &c."

Fifth year's study.

In the *fifth* year, the Codices were explained, namely, the Codex Gregorianus, the Codex Hermogenianus and the Codex Theodosianus. The official name for the students in this year was προλύται (prolytæ) as they were placed before the λύται (lytæ) in point of rank. Thus from the period of the third century A.D. the Roman schools of law gradually developed in the two royal cities of Rome and Constantinople, as well as at Berytus, until the period of Justinian, 527 A.D., when the emperor found the plan of instruction above sketched prevailing in the empire. The great alterations made by this emperor in the legal system of Rome, rendered a reconstruction of the law schools necessary. To this alteration our attention must now be briefly directed.

(i) Hein. Ant. Rom. Prœm. sec. 45.

III. After the publication of the books of legislation by Justinian, namely, the Institutes, the Pandects and the Codex, a new system of instruction became necessary which was inaugurated by the emperor. This body of legislation, named by Dionysius Gothofredus in a later age (A. D. 1583) the "Corpus Juris Civilis," as distinguished from that collection of ecclesiastical law known as the "Corpus Juris Canonici," became the code of legislation for the whole Roman Empire, and formed the basis for the legal instruction imparted at Rome, at Constantinople, and at Berytus. In these schools, five years continued to be the allotted period of study, and this legal course was made imperative. This "*quinquennium academicum*" lasted for several centuries, and even in modern times in some countries it has been the period deemed necessary to be devoted to initiatory studies in the law. The following was the plan laid down by Justinian. In the *first* year of study, instead of the Institutes of Gaius, there were substituted the Institutes of Justinian, and for the "*Libri singulares*" were substituted the first part of the Digest entitled "πρῶτα." So that the principal part of the plan of the first year was the same as that used for so long a period before Justinian's reform. The ridiculous *cognomen* of "Dupondii" was done away with, and the students of the first year were called "Justiniani." Justinian, in his constitution "*Deo auctore*," sec. II, says "Et primo quidem anno nostras hauriant Institutiones, ex omni pæne veterum Institutionum corpore elimatas, et ab omnibus turbidis fontibus in unum liquidum stagnum conrivatas tam per Tribonianum, virum magnificum, magistrum et exquæstore sacri palatii nostri et exconsule, quam duos e vobis, id est Theophilum et Dorotheum, facundissimos antecessores. In reliquam

Studies in the law schools in the time of and after Justinian.

In the first year.

vero anni partem secundum optimam consequentiam primam legum partem iis tradi sancimus, quæ Græco vocabulo πρῶτα nuncupatur, qua nihil est anterius, quia quod primum est, aliud ante se habere non potest; et hæc iis exordium et finem eruditionis primi anni esse decernimus. *Cujus auditores non volumus vetere tam frivolo, quam ridiculo cognomine Dupondios appelari, sed Justinianos novos nuncupari*, et hoc in omne futurum ævum obtinere censemus, &c."

In the second year.

In the *second* year, the second or third part of the Digest was read, and a selection also from the fourth and fifth parts, namely, the twenty-third, twenty-sixth, twenty-eighth and thirtieth books of the Pandects—the twenty-third book, "*de jure dotium*," the twenty-sixth, "*de tutelis*," the twenty-eighth, "*de testamentis*." and the thirtieth, "*de fidei-commissis*." The student of this year retained the former name of "Edictales" though it was not suitable to what they now read. The ordinance of Justinian is contained in the following words: "Alterutri autem eorundem volumini, *id est de judiciis vel de rebus*, adjungi in secundi anni audientiam volumus quatuor *libros singulares*, quos ex omni compositione quatuordecim librorum excerpsimus; ex collectione quidem tripertiti voluminis, quod *pro dotibus* composuimus, uno libro excerpto; ex duobus autem *de tutelis et curationibus* uno; et ex gemino volumine *de testamentis* uno; et ex septem libris *de legatis et fideicommissis*, et quæ circa ea sunt, simili modo uno tantum libro."

In the third year.

In the *third* year, the second or third part of the Digest was read according as the one or the other had been omitted in the second year; and in addition to this, the twentieth, twenty-first and twenty-second books of the Digest. These books came in place of the

Responsa of Papinian. Every title of the twentieth book, except the third, begins with an extract from the writings of Papinian. The third title contains no extract at all from the writings of Papinian, and hence the playfulness of Justinian or Tribonian could not be fully carried out. The students of the third year were still called "Papinianistæ" and the Papinian festival was retained to inaugurate the third year's study; although the students were not immediately occupied with the writings of Papinian, but principally upon these three books of the Pandects, which only contained some extracts from his works. These three books of the Digest after the time of Justinian had a technical name given to them, being called by the Byzantine jurists *antipapianos*—ἀντιπαπιανὸς or ἀντιπαπιανα βιβλία—that is, the books that came in the place of the books of Papinian. "Tertii insuper anni (says Justinian) doctrina talem ordinem sortiatur, ut *sive libros de judiciis, sive de rebus* secundum vices legere iis sors tulerit concurrat iis tripertita legum singularium dispositio, et in primis *liber singularis ad hypothecariam formulam*, quem oportuno loco, in quo de hypothecis loquimur, posuimus; ut quum æmula sit pignoraticiis actionibus, qui in libris *de rebus* positæ sunt, non abhorreat eorum vicinitatem, quum circa easdem res ambabus pæne idem studium est. Et post eundem *librum singularem* alius liber similiter iis aperiatur, quem *ad Edictum ædilium*, et *de redhibitoria actione*, et *de evictionibus*, *nec non duplæ stipulatione composuimus*, *&c.* . . . Et hos tres libros cum acutissimi Papiniani lectione tradendos posuimus, quorum volumina in tertio anno studiosi recitabant, non ex omni eorum corpore, sed sparsim pauca ex multis et in hac parte accipientes. . . . . Ne autem tertii anni auditores quos Papini-

anistas vocant, nomen et festivitatem ejus amittere videantur, ipse iterum in tertium annum per bellisimam machinationem introductus est; librum enim hypothecariæ ex primordiis plenum ejusdem maximi Papiniani fecimus lectione, *ut et nomen ex eo habeant et Papinianistæ vocentur, et ejus reminiscentes et lætificentur et festum diem, quem, quum primum leges ejus accipiebant celebrare solebant, peragant*, et maneat viri sublissimi prefectorii Papiniani et per hoc in æternum memoria, hocque termino tertii anni doctrina concludatur."

In the fourth year.

In the *fourth* year of their studies, the remaining part of the Pandects, to the fifth part inclusive, was the subject of study. The sixth and seventh parts of the Pandects were not the subject of study in the law schools. Justinian thought that the student who had mastered the first five parts of the Pandects might be trusted to wend his way alone through the intricacies of the sixth and seventh parts. Thus, during the four years' course, the four books of the Institutes of Justinian and the first thirty-six books of the Digest were the subject of recitation and exposition, under the guidance and instruction of the professors. The students of the fourth year retained the name of λύται (lytæ), although it was not as suitable to them, as it had been previously. In regard to this year's instruction, Justinian ordained as follows: "Sed quia solitum est, anni quarti studiosos Græco et consueto quodam vocabulo λύτας (solutores) appellari, habeant quidem, si maluerint, hoc cognomen; pro Responsis autem prudentissimi Pauli, quæ antea ex libris viginti tribus vix in decem et octo recitabant, per jam expositam confusionem eos legentes, decem *libros singulares*, qui ex quatuordecim, quos antea enumeravimus, supersunt, studiant lectitare, multo majoris et amplioris prudentiæ

ex iis thesaurum consecuturi, quam quem ex Paulianis habebant Responsis. Et ita omnis *ordo librorum singularium* a nobis compositus et in decem et septem libros partitus eorum animis imponetur, *quem in duabus Digestorum partibus posuimus, id est quarta et quinta,* secundum septem partium distributionem ; et quod jam primis verbis Orationis nostræ posuimus, verum inveniatur, ut ex triginta sex librorum recitatione fiant juvenes perfecti, et ad omne opus legitimum instructi, et nostro tempore non indigni, duabus aliis partibus, id est sexta et septima nostrorum Digestorum quæ in quatuordecim libros compositæ sunt, ibidem appositis, ut possint postea eos et legere, et in judiciis ostendere." (*j*)

In the *fifth* year the code of Justinian was read and explained. This came in the place of the three codes mentioned already above. To this was added the private study of the sixth and seventh parts of the Digest. The students in this year retained the old name of "prolytæ." Justinian says, "Et in quinti anni, quo prolytæ nuncupantur, metas Constitutionum Codicem tam legere, quam subtiliter intelligere studeant." In the fifth year.

Section XVII.—*A Review of the most distinguished Roman Jurists, and especially of those mentioned in the Pandects.*

In this chapter all that now remains is to present a brief notice of the most distinguished Roman jurists who flourished in the classical period. Unless we have a catalogue before us of the principal jurists, especially

(*j*) Constit. "Deo auctore," sec. 5.

of the first and second centuries of the empire, and the order of time in which they flourished—whether, for example, Gaius preceded Papinian, or *vice versa*, we cannot know whose authority is to decide. A brief chronological catalogue of this kind will be found of great value, so that we may be able when we examine a passage in the Digest at once to decide which is the more recent opinion. To arrange this is by no means an easy task, at least in regard to many names that occur in the Pandects. We shall commence with the time of Tiberius. In Sec. XV, in treating of the literary activity of the Roman jurists, we have already recorded the names of the *veteres* from the time of Marcus Porcius Cato and his son to the time of Aulus Ofilius — a younger contemporary of Cicero — the author of the first detailed commentary on the Edict. Again, in Sec. XIV we have mentioned the two great jurists, Labeo and Capito, who flourished under Augustus; so that by commencing with the reign of Tiberius, the chain of succession will be preserved unbroken. We may with advantage distinguish three periods.

I. The classical jurists from the time of Tiberius to Nero, inclusive. This will extend to a period beyond the middle of the first century of the Christian era—to about the year 60. First, Massurius Sabinus, of the school of Capito. One of the great schools of Roman law, as we have already seen, was named after him, although Capito was the actual head of the sect. Gaius mentions him as the founder of this school. "*Sabinus quidem et Cassius ceterique nostri præceptores.*" (*a*) Sabinus lived in great poverty, but by

(*a*) Gaius I. sec. 196. II. sec. 15.

the force of his genius, when he was fifty years of age, he rose to the equestrian order, and, under Tiberius, appears to have obtained the *jus respondendi*. He is an example of a man advancing himself to eminence by means of his great talents. His principle work was the "*Libri tres juris civilis*," a book containing a short abridgement of the law. This work was freely commented upon by succeeding jurists. Thus, Pomponius wrote at least thirty-six "libri ad Sabinum," many extracts of which are in the Pandects. Ulpianus at least fifty-one "libri ad Sabinum." We possess extracts from fifty-one books. Paulus at least forty-seven "libri ad Sabinum." It is not improbable that the arrangement of the work of Sabinus was modelled upon the "libri XVIII, juris civilis" of Scævola. We are not in possession of any extracts from the original work of Sabinus. (*b*)

2. Marcus Cocceius Nerva, *the father*. He lived at the same time as Sabinus, and belonged to the school of Labeo and Proculus. He was a most intimate friend of Tiberius, and consul A.D. 22 (775 A.U.C.). Filled with despair at his own condition and that of the State, he resolved to commit suicide, which, notwithstanding the earnest remonstrance of Tiberius, he finally carried into effect. (*c*) Nerva pater.

3. Sempronius Proculus (*d*), who gave the name of Proculian to the school of Labeo. He is not very often quoted in the Pandects—in all, thirty-seven times, but he is frequently mentioned by later jurists. Proculus.

4. Nerva, *the son* of M. Cocceius Nerva, about 96 Nerva filius.

(*b*) Puchta's Inst. vol. I. 444, 445, and note *s*.

(*c*) Tac. Ann. VI. 26. Dio. Cas. LVIII. 21. Puchta's Inst. I. 454.

(*d*) L. 47 d. leg. (2. 31.)

or 98 A.D. He, at seventeen years of age, it is said, "*publice de jure responsitasse.*" He was both a statesman and a jurist under Nero. (*e*)

Cassius. 5. C. Cassius Longinus was a jurist who flourished at the same time as Nerva junior. He was a distinguished leader in the Sabinian school, and is mentioned as Cassius in connection with Sabinus. He is often referred to in the political history of the times, and was an object of dread both to the senate and to Nero on account of his strong attachment to the old Roman Republican times. He was banished under a frivolous pretext by Nero to Sardinia, but recalled by Vespasian. He is often referred to in the Pandects, though there are no extracts from his writings. (*f*) "Caius Cassius Longinus (says Pomponius,) natus ex filia Tuberonis; quæ fuit neptis Servii Sulpitii, et ideo proavum suum Servium Sulpicium appellat. Hic consul fuit cum Quartino temporibus Tiberii, sed plurimum in civitate auctoritatis habuit ejusque, donec eum Cæsar civitate pelleret; expulsus ab eo in Sardiniam, revocatus a Vespasiano diem suum obiit."

Ferox. 6. Urseius Ferox, mentioned in the Pandects in connexion with Cassius, and also "Julianus, libro II, ad Urseium Ferocem." A jurist under Tiberius and the following Cæsars. (*g*)

Cartilius. 7. Cartilius, a jurist referred to by Proculus in his *Epistolæ*. There is an interesting question in the law of inheritance decided by Proculus in which the view of Cartilius was approved. (*h*)

Atilicinus. 8. Atilicinus, a contemporary and disciple of Pro-

(*e*) L. 1. sec. 3. d. post. (III. 1) Tac. Ann. 15. 72.

(*f*) Tac. Ann. 16. 7. 9. Suet. Nero 37. Pomp. l. 2. sec. 47 d. O. J. (I. 2.)

(*g*) L. 1. sec. 10. (44. 5.) inscrip. l. 48. (23. 3).

(*h*) L. 69. (28. 5.)

culus, and mentioned by him in his *Epistolæ* in connexion with the law of husband and wife. (*i*)

9. Fufidius, mentioned both by Africanus and Gaius. (*j*) There are extracts in the Pandects from all four of the last named jurists, and they lived between the years 50 and 70 in the first century of the christian era. Fufidius.

II. The jurists who flourished from Vespasian to Domitian, during the last third of the first century. We shall enumerate the list in succession.

10. Cœlius Sabinus, not to be confounded with Massurius Sabinus. He exerted much influence in the time of Vespasian, and was consul in A.D. 69. He belonged to the Proculian school, and Pomponius says of him "*Cassio* Cœlius Sabinus successit, qui plurimum temporibus Vespasiani potuit." (*k*) Cœlius Sabinus.

11. Pegasus, Præfectus urbi under Vespasian, and also Consul. "Proculo Pegasus (says Pomponius) qui temporibus Vespasiani, Præfectus urbi fuit." (*l*) About the same time Plautius probably lived, who appears to have composed a manual, commented upon by later jurists ("libri ex Plautio, ad Plautium"). Pegasus.

12. Juventius Celsus, the father, a disciple of the Proculian school. Celsus pater.

13. Plautius. The writings of Plautius himself do not exist, but a number of "libri ad Plautium" were written, which are extensively used in the Pandects. Thus Neratius, Javolenus, Pomponius and Paulus, wrote "*ad Plautium.*" Paulus wrote at least eighteen libri "*ad Plautium.*" Plautius must have been a distinguished jurist to have been thus commented upon by the most able and profound of the Roman lawyers. The Plautius.

(*i*) L. 12. (23. 4.)
(*j*) L. 5. (34. 2.) l. 25. (40. 2.)
(*k*) L. 2. sec. 4 d. orig. jure (1. 2.)
(*l*) Id.

extracts we possess " ad Plautium " treat especially on matters open to dispute and controversy.

III. The next period, we may indicate, extends from Domitian to Hadrian, the first third of the second century of the christian era.

Javolenus. 14. Priscus Javolenus; he was a Sabinian and a most acute jurist; there are 206 extracts from his writing found in the Pandects. He was the author of many new views in the Roman Law, as on Novatio and some other subjects. Pliny says that he had periodical fits of insanity: "*est omnino Priscus dubiæ sanitatis.*" (*m*) If Pliny refers to the same person, it is certain that what has been conjectured to have been only a certain absence of mind, did not affect the profundity of his views or diminish the acuteness of his understanding.

Celsus filius 15. P. Juventius Celsus—"Celsus *filius*;" a renowned jurist, and also noted for the rudeness of his replies: hence a rude answer came to be called a "responsio Celsina." The phrases "quæstio Domitiana" and "responsio Celsina" were used as synonymous with a foolish question and a rude answer. (*n*) Celsus was engaged very actively in public affairs, and was implicated in the conspiracy against Domitian in favour of Nerva. Under the latter and his successors he was made prætor and was twice consul. He was also active under Hadrian. (*o*) From his libri XXXIX digestorum there are 142 extracts in the Digest. He is also mentioned in other places and his words quoted. As one of the most distinguished jurists, he is characterized alike by precision and depth of thought. An action

(*m*) Plin. epis. VI. 15.
(*n*) Lex 27 testam. (28. 1.)
(*o*) Spartian Hadr. 18.

called the *condictio Juventiana* a species of *condictio ex mutuo* was named after Celsus. (*p*)

16. Neratius Priscus lived under Trajan, and was so highly esteemed by him, that the Emperor is reported to have uttered expressions giving rise to the supposition that he intended him for his successor in the empire. The "*septem libri membranarum*" of this writer is a masterly work. Neratius discussed legal questions with the greatest ability. There are 64 extracts from his works in the Pandects—from his *membranarum regularum*, and *responsorum*. These extracts are regarded as the very pearls of the Digest, and the civilian is more than pleased when he alights upon an extract from Neratius. He belonged to the Proculian school. Neratius.

17. T. Aristos, a contemporary of Neratius, and referred to especially by his friend Pliny as one of the noblest of men and as possessing a mine of knowledge. His name is mentioned in the Pandects, (*q*) and in one passage he, it is said, "et ita Aristo notat *apud Sabinum*." (*r*) Aristo.

18. Minucius Natalis. Julian in the time of Hadrian wrote "*libri ad Minucium*." Natalis Minucium.

19. Lælius, who also lived during the time of Hadrian. Paulus "ad Plautium" tells a strange story derived from Lælius; he says, "Sed et *Lælius scribit*, se vidisse in Palatio mulierem liberam, quæ ab Alexandria perducta est, *ut Hadriano* ostenderetur cum quinque liberis ex quibus quatuor eodem tempore enixa, inquit, dicebatur, quintum post diem quadragesimum." (*s*) Lælius flourished, and the five following jurists, at or before Lælius.

(*p*) L. 67. sec. 2. de furtis (47. 2.) l. 59. sec. 1. de hered. instit. (28. 5.)
(*q*) Plin. epis. I. 22. VIII. 14. et al.
l. 7. sec. 3. D. (7. 1.)
(*r*) L. 6. (7. 8.)
(*s*) L. 3. si pars. hered. (5. 4.)

the time of Hadrian, but the exact period cannot be stated.

Octavenus. 20. Octavenus is mentioned several times in the Digest, but there is nothing special to note regarding him.

Severus. 21. Valerius Severus cited by Julianus in the Pandects.

Arrianus. 22. Arrianus, who wrote on the Interdict. Ulpian says "et Arrianus libro secundo de interdictis putat teneri;" that is, he adds "qui scit se heredem non esse pro herede possideat." (*t*)

Fulcinius. 23. Fulcinius Priscus; he is mentioned by Paulus, (*u*) by Neratius, and in other places in the Pandects. Neratius, libro I Responsorum, says, "Fulcinius inter virum et uxorem mortis causa donationem ita fieri, si donator justissimum mortis metum habeat."

Velleianus. 24. Velleianus.

Pelius. 25. Sextus Pelius.

IV. The next period embraces the reigns of Hadrian and the two Antonines, 120 to 170 A.D.

Valens. 26. Aburnius Valens, mentioned by Pomponius as belonging to the same school as Tuscianus and Salvius Julianus. There are twenty extracts from his writings in the Pandects.

Tuscianus. 27. Tuscianus. It is very difficult to determine when he appeared. As we have already seen he is cited by Pomponius as a distinguished jurist before his time, as a compeer of the celebrated Salvius Julianus and as a prominent leader of the Proculian School. (*v*)

Julianus. 28. Salvius Julianus flourished under Hadrian and subsequent emperors. His great work, as already

(*t*) L 11 de hered. pet. (5. 3.); see also l. 1. sec. 4. quod leg. (43. 3.)

(*u*) L. 6. pr. de act. rer. amot. (25. 2); also l. 43. de mann. (40. 1.)

(*v*) L. 2. sec. 47. de orig. jur. (1. 2.)

noted, was the new edition of the Prætorian Edict, "Julianus sub divo Hadriano edictum perpetuum composuit." (*w*) This work of Julianus obtained authority in the Roman forum, so that "Diocletianus et Maximianus Imperatores illud JUS PERPETUUM adpellare non dubitant." (*x*) But this was not the only work of Julianus; he also composed, libri XC digestorum a great systematic work on the civil law. There are four hundred and fifty-eight extracts from Julianus in the Pandects, for the most part taken from this work. He was possessed of an acute mind, and was the author of many striking and original views. He was made prætor; twice consul; and prefectus urbi. He is very often referred to by other jurists more frequently even than Labeo.

29. Sextus Pomponius, a younger contemporary of Julianus, and a jurist whose writings are of great importance. There are five huudred and eighty-five extracts, great and small, from his works in the Pandects. The "lex II, de origine juris," so often quoted, and so valuable as a compendium of legal history, is taken from his "libro singulari Enchiridii." He wrote also other works, as for example, "ad Quintum Mucium," "ad Sabinum," "ex Plautio," "epistolarum," &c. He was a *cassiana*, as the adherents of the schola Sabinianorum were sometimes called, and in his enumeration of earlier jurists, he does not conceal this, as he calls C. Cassius Gaius *noster* (*y*) "quod Caius noster dixit." Pomponius.

30. Gaius. A contemporary of Pomponius and subsequent to Julius. In regard to Gaius there are several points that still remain problematical. As to Gaius.

(*w*) Eutropius, 8. 17. Prœm. sec. 14.
(*x*) See Heineccii Antiq. Rom.
(*y*) L. 39. de stip. serv (45. 3.)

his name—its correct spelling—though this is not of much importance: whether it is spelt with an *i* or a *j*, and whether the initial letter should be a *C* or a *G*. Boecking, after research and deliberation, and Lachmann, who are great authorities, decide for *i* and *G*, and for three syllables, not two. Boecking says, "Gaii nomen *trisyllabum* est." "Neque *C* sed *G* prima nominis littera est, ut lapides bonique codices scripti idemque ipse Quintiliani locus, &c."(*z*) Again, in his Institutes he says, "Gaius—not Gajus, nor Caius, nor Cajus." (*a*)

As to the question, Where did he live? this is still disputed. It has been said that he flourished one hundred years before Justinian, in the fifth century. A later opinion is that he must be reckoned as one of the classical jurists. Hugo, a great authority on the history of the Roman Law, was of opinion that he was a contemporary of Ulpian and Paulus, and that he flourished under Severus and Caracalla, i.e. between 193 and 217 A.D., so that at the time of Antoninus Pius, 161 A.D., he was scarcely born. This conjecture cannot be admitted. Gaius often mentions Hadrian in his Institutes, and always with the appellation of *divum* except in two passages (*b*), in which he merely refers to Senatus-consulta made *ex auctoritate Hadriani*. Hadrian died 138 A.D., and was succeeded by Antoninus Pius, who reigned till 161 A.D. The better opinion is that Gaius wrote his Institutes in the reigns of Antoninus Pius and M. Aurelius Antoninus Philosophus, whom the Romans are accustomed to cite as Marcus. Marcus reigned with Lucius Verus till 169 A.D., and then

(*z*) Præfatio Gaii Instit. in notæ e 5. p. v.

(*a*) Abriss der Instit. p. 7. (b)

(*b*) L. sec. 47. II. sec. 57, see also for *Divum* Hadrianum l. 7. de rebus dub. (35. 5.)

alone till 176 A.D. Marcus Aurelius and Lucius Verus are called by the Roman jurists divi fratres or Marcus et Verus, also Antoninus et Verus. It was about this time that Gaius wrote. Gaius, in his book, mentions Antoninus Pius, and says, "nam ex constitutione sacratissimi imperatoris Antonini," (*c*) and again, "nunc ex epistula optimi imperatoris Antonini quam scripsit pontificibus." (*d*) These passages contain nothing in them to lead to the supposition that Antoninus was dead; and the tone of the extracts would seem to indicate that he was living. Again, in the second book of his Institutes, Gaius says, "set *nuper* imperator Antoninus significavit rescribto," (*e*) and a little farther on in the same book he expresses more plainly that he was deceased, "sed *hodie* ex *divi* Pii Antonini. (*f*) This is proof that he wrote not only after Hadrian but after Antoninus Pius. The general opinion now is—an opinion that was formerly ignored—that Gaius was born under Hadrian, and that he flourished and wrote under Antoninus Pius and his immediate successors. It seems also quite clear that Gaius had published his Institutes before the decease of Marcus, for Ulpian in his "Fragmenta" informs us of a constitution of divus Marcus on the doctrine of Cretio, and this constitution with its alterations is not introduced into the Institutes by Gaius. (*g*) It is scarcely to be conceived that Gaius would have been ignorant of the alteration if he had written after this constitution of Marcus. (*h*)

Another problem unsolved in connection with Gaius

(*c*) Gaius I. sec. 53.
(*d*) Gaius I. sec. 102.
(*e*) Gaius II. sec. 126.
(*f*) Gaius II. sec. 195.
(*g*) Ulp. frag. XXII. sec. 34. Gaius II. sec. 177.
(*h*) Boeking's Præfatio Gaii Inst. pp. 6. 7. and Puchta's Instit. vol. I. 466

is that whilst he belonged to the most distinguished of the Roman jurists, as we know from the fact of his being one of the collegium that constituted the so-called "citation law" of Valentinian III; from the fact that his Institutes for centuries were placed in the hands of the Roman law students in their first year's course; that they were epitomized and received into the West Gothic Code; and that hundreds of extracts are found from his other writings in the Pandects—still it is a remarkable fact that no later jurist ever mentions Gaius. It is the more remarkable, as a number of inferior men are referred to, and extensive quotations given from their writings. Frequent mention is made of the great jurists—of Cassius, of Julianus, of Ulpianus, of Paulus, and others—but Gaius is never mentioned by a subsequent jurist. If he had been a later jurist this would account for it, but it was not so; or if he had been a writer of no importance. He was the coryphæus of the Roman classical jurists, and this silence is almost inexplicable. Was it that Gaius was not his principal name, that it was his *cognomen*, and that he is quoted under some other name? Was it because he was a provincial jurist, and did not live in Rome, that he had not the *jus respondendi*, that he was not to be classed with those "quibus permissum est jura condere?" Would it have been a breach of etiquette with the Roman lawyers to have quoted the *sententiæ et opiniones* of one whom they regarded only as a writer of text-books, a private teacher of the law, and not an authorised expounder of its doctrines. These are the only conjectures which at present have been made. The fact that Gaius is not mentioned by later jurists is remarkable and could not be overlooked.

The discovery of Gaius—that is, of his Institutes—at Verona, in 1816, was of the greatest importance to the student of the Roman law, as without doubt it is the greatest literary treasure found in the present century. This work has exerted an immense influence on the study of the Roman law, and especially the Fourth Book of the Institutes, on the views which were previously held in regard to Roman Civil Process. Some passages also in the Pandects before unexplained and indeed inexplicable, are rendered perfectly clear and intelligible by the discovery of the commentaries of Gaius.

Gaius is the last writer who is presented to us as a Sabinian. Traces of the renowned Proculian school ceased earlier, since after Celsus and Neratius Priscus we hear of no other jurist of this sect. The "Institutionum Commentarii Quattuor" of Gaius possess an additional interest, not only because they are written in a lively and attractive style, but because they approach nearer to completeness than any other work rescued from the wreck of the older Roman jurists. This work, found by Niebuhr in 1816, in the library of the chapter at Verona, had been obliterated, and the parchment written over with the letters of St. Jerome.

This great treatise was not the only work of Gaius. In addition to the Institutes, he wrote a commentary on the Twelve Tables, on the Lex Julia et Papia, on the prætorian, ædilitian, and provincial edicts, also some monographs, and lastly, "libri VII rerum quotidianarum s. aureorum." From the last work we find extracts only out of the first three books inserted in the Pandects. The whole number of extracts from the writings of Gaius in the Digest is five hundred and thirty-five. It will be observed that among his mani-

fold writings we find no *responsa*, no *questiones*, whilst on the other hand of a book "de casibus," in which remarkable legal cases are collected, none appears to have been decided by himself, and some are manifestly feigned. This serves to confirm the view that he did not possess the *jus respondendi*, and to support the conjecture that he probably was at the head of a private school for teaching the law. (*i*)

Africanus. 31. Sextus Cæcilius Africanus. He was not a very fertile writer, and only one of his works is quoted in the Pandects—libri IX quæstionum. From these libri, in which a number of legal questions are treated and opinions cited, one hundred and thirty-one extracts, some of considerable length, are cited in the Digest, and their difficulty has become proverbial. The expression "Africani lex" is used as equivalent to *difficilis*. We have a commentary on Africanus by Cujacius which is a masterly work. This Africanus is without doubt the same person that A. Gellius introduces as holding an interesting discussion with a philosopher named Favorinus. The philosopher attacks certain passages from the laws of the Twelve Tables, and Sextus Cælius defends them. Africanus was contemporary with A. Gellius. (*j*)

Clemens. 32. Terentius Clemens. This author wrote a great work, "libri XX ad C. Juliam et Papiam," passed in the time of Augustus, also on Marriage and the law of Inheritance. We have thirty-five extracts from Clemens in the Digest. Jacob Gothofredus when he

(*i*) See Puchta Inst. vol. I. p. 462 et seq; also for a fuller account of Gaius, "Some account of the life and commentaries of Gaius," pp. 1—20, in the translation of his "Commentarii quattuor," also the "Law Review," No. XXXIX, new series, pp. 14, 15, both from the pen of the author of this work.

(*j*) Gellius N. A. 20. 1.

tried to reconstruct the legem Juliam et Papiam used these extracts frequently.

33. Junius Mauricianus. He wrote six books "ad legem Juliam et Papiam" and also "de pœnis." Four extracts only are found from his writings in the Pandects. Mauricianus.

34. Vindius, who is mentioned in the Pandects by Ulpianus "Vindius scribit," and by Mæcianus, who cited his opinion as "Vindius noster," on the *quarta Falcidia*. (*k*) We find no mention of him by later jurists. Vindius.

35. Lucius Volusius Mæcianus. There are extracts from a great monograph written by Mæcianus on fidei-commissum in XIV libri. (*l*) Extracts are found from this work in the thirty-second book of the Pandects. He also wrote "ex lege Rhodia" and "de publicis judiciis, sive publicorum." There are forty-four passages taken from his writings in the Digest. He also wrote on the As, and the parts of the As. This work, with that of Balbus, on the As is edited by Boecking in the Bonn "corpus juris rom. antej." He died in the time of Marcus Aurelius, who appears to have studied jurisprudence under his guidance. Mæcianus.

36. Claudius Saturninus. There is only one extract given from the writings of Saturninus in the Digest. A. Quintus Saturninus, who is mentioned "libro decimo ad Edictum scribit," (*m*) and again in another passage, "Quintus Saturnius consentit," (*n*) but whether Quintus is the same person as Claudius, we have no means to determine. The single extract from Claudius Saturninus is taken from a "libro singulari Saturninus.

(*k*) L. 7. sec. 18. (2. 14.) L. 32. sec. 4. (35. 2.)

(*l*) Capit. Marc. 3. Jus 12.

(*m*) L. 12. sec. 7. de auro, argento, &c. (34. 2.)

(*n*) L. 13. sec. 6. de jurejurando, (12. 2.)

de pœnis paganorum," and is quoted in the l. 16 "de pœnis" (48. 19). It is interesting, as he gives the quatuor *genera*, or heads out of which punishment may arise; these are *facta*, *dicta*, *scripta*, and *consilia*. And these *quattuor genera* consideranda sunt septem modis: causa, persona, loca, tempore, qualitate, quantitate, eventu. These modes are severally explained, and this constitutes the only extract from this writer found in the Pandects.

Justus. 37. Papirius Justus. He wrote under the "Divi fratres"—Marcus Aurelius and Lucius Verus—"de constitutionibus," XX libri of imperial constitutions; namely, rescripta and decreta. Of these sixteen extracts are found in the Pandects.

V. The next period, and the closing one of the classical jurists, extends from the time of the Antonines, A.D. 170, to the reign of Alexander Severus; this will include the end of the second century, and the beginning of the third century of the christian era till the year 230 or 240 A.D.

Paternus. 38. Tarruntenus Paternus. He is quoted twice in the Digest. He was præfectus prætorio under Commodus, and was executed on a charge of pretended treason. (*o*)

Marcellus. 39. Caius Ulpius Marcellus. Marcellus is one of the most distinguished jurists, and is quoted one hundred and fifty-nine times in the Digest. Ulpianus often quotes him as an authority. He was a councillor of state under Marcus Aurelius, and a general in Britain in the time of Commodus. He was envied by this prince on account of his virtue and ability. (*p*)

(o) Lamprid. Com. 4. Dio. Cass. 72. 8.

(p) L. 3. de his qui. in test. (28. 4.) Dio. Cass. 72. 8. Son. Hist. Eccl. 13. 4.

40. Quintus *Cervidius* Scævola. This jurist is not to be confounded with the great republican lawyer, Quintus *Mucius* Scævola. He gave instruction in the principles of the law to Septimus Severus, who was afterwards emperor, and also to the celebrated Papinian. (*q*) Papinian often mentions his teacher in terms expressive of the highest respect and honour. Modestinus, the last of the great jurists, mentions Scævola, Paulus and Ulpianus as the three greatest of the Roman jurists. He says:—"Οὗτος γὰρ καὶ κερβίδιος Σκαιβόλας, καὶ Παῦλος, καὶ Δομίτιος Οὐλπιανὸς, οἱ κορυφαῖο τῶν νομικῶν," &c. ("Ita enim Cerbidius Scævola, et Paulus, et Domitius Ulpianus, coryphæi legum prudentum," &c.) (*r*) He is said to have rendered considerable service to Marcus Aurelius by his legal opinions. (*s*) His principal writings were "libri VII responsorum," "libri XX quæstionum," and "libri XL digestorum." There are three hundred and seven extracts from his writings in the Digest. In his Responsa, the facts of a case are stated, and the decision or solution given in the fewest possible words, and generally without the connecting links of reasoning. The Questiones are devoted to an elaborate proof and justification of the decisions given, and his Digests contain Responsa sometimes comprising only a short statement of the decision, and sometimes, as in the Responsa, an explanation of the principles on which the decisions are made. (*t*)

Q. C. Scævola

41. Æmilius Papinianus was as great a jurist as Scævola, and, if not the greatest, at least on a level with the most distinguished of the Roman lawyers. In

Papinianus.

(q) Spartian. Carac. 8.
(r) L. 13. sec. 2 de excusat. (27. 1.)
(s) Capitol. Marc. 11. Spartian. Carac. 8.
(t) L. 60 mand (27. 1.) l. 93 pr. de leg. (3. 32.)

every respect, he was a noble and brilliant man. The excerpts from his writings form a large and important part of the Pandects. There are in the Digest not less than five hundred and ninety-five passages from his legal works. Not only was he remarkable for his acuteness in all legal questions, but especially for his manly character and noble conduct throughout the whole of his life. Succeeding emperors called him *Pius*, and no other jurist attained to the same degree of reverence from posterity. He was long active in the affairs of the state, and filled the high office of præfectus prætorio. He is supposed to have accompanied the Emperor Severus, with whom he lived on terms of the closest friendship, to Britain, and to have been present at the monarch's death at York in A.D. 211. Severus committed his two sons, Geta and Caracalla, to Papinian's care. When Caracalla subsequently murdered his brother, and conceived a justification and defence necessary to be presented to the senate and the people, he applied to Papinian for this purpose. Papinian repelled the request with the cutting reproof—"that it was easier to murder a brother than to defend the guilty deed;" or, according to another account, with the reply—"that to accuse an innocent person who has been criminally slain is to commit a second murder." He and his son were ordered to be executed by Caracalla, and to add insult to injury, he was slain with the axe instead of the sword, in shameful violation of the Roman Law. "Vita (says Ulpian), adimitur, ut puta si damnatur aliquis, ut *gladio* in eum animadvertatur; sed animadverti *gladio* oportet, non *securi*, vel telo, vel fusti, vel laqueo, vel quo alio modo." (*u*) The constancy and

(*u*) L. 8. sec. 1. de pœnis (48. 19.)

virtue of Papinian, even to his death, add emphasis and vitality to his own striking remark, "Quæ facta lædunt pietatem, existimationem, verecundiam nostram, et, ut generaliter dixerim, contra bonos mores fiunt, nec facere non posse credendum est." (*v*)

From his writings, as especially deserving notice, are "libri XX responsorum," "libri XXXVII questionum," "libri II definitionum." He also wrote a "lib. sing. de adulteriis," and "Ἐκ τοῦ ἀστυνομικοῦ μονοβίβλιου," &c. The fragments from Papinian, both as regards matter and form, are to be classed with the most valuable in the Pandects. He was commented upon by his contemporaries as by Martianus, Ulpianus, Paulus, and their successors. It will be remembered that Valentinian III made him the president of the *collegium* for the celebrated "citation law:" that the students of the third year were engaged in the study of his works, and were called Papinianistæ, an appellation subsequently retained by Justinian for students of the same year: the twentieth, twenty-first, and twenty-second books of the Pandects were called by the Byzantine jurists, ἀντιπαπιανοῦ βιβλία or ἀντιπαπιανὸς, a name by which they are still known: that in the twentieth book each title except the third begins with an extract from the writings of Papinian: and that the legal students' feast also bore his name. Papinianus and Ulpianus must certainly be regarded as the most distinguished of the Roman jurists.

42. Claudius Tryphoninus lived also under Severus and Caracalla: seventy-nine extracts from his writings are found in the Pandects. Tryphoninus.

(v) L. 15. de cond. inst. (28. 7.) Conradi de vito et scriptis Q. Cervidii Scævolæ, Leipzic, 1755. See also Puchta Inst. vol. I. p. 471, et seq.

Menander. 43. Arrius Menander lived at the same time, and from his writings there are six extracts in the Pandects.

Tertullianus. 44. Tertullianus: he wrote a "lib. sing. de castrensi peculio," and also "questionum." There are five extracts from his writings in the Pandects. He is probably the same person as the celebrated patristic writer Quintus Priscus Tertullianus. This is rendered probable by the fact that they lived at the same time. Eusebius also, the ecclesiastical historian, speaks of Tertullianus as being aquainted with the Roman Law: "ἄνδρα τοὺς Ῥωμαίων νόμους ἠκριβωκοτα." In the writings of the father there are also many legal expressions and allusions which serve to confirm the opinion.

Ulpianus. 45. Domitius Ulpianus, in direct contrast with the last-named writer, was a bitter enemy of Christianity, and the most violent opponent of the Church in his day. He was born in Phœnicia, in Syria, as he himself informs us, and extols his birthplace, "Sciendum est, esse quasdam colonias juris Italici, ut est in Syria *Phœnice splendidissima Tyriorum colonia, unde mihi origo est*, nobilis regionibus, serie sæculorum antiquissima, armipotens, fœderis, quod cum Romanis percussit, tenacissima," &c. (*w*) He lived at the time of Septimus Severus, flourished especially under Caracalla, and also for a short time under Alexander Severus. He held the most prominent position in the state as prefectus prætorio, and was called *amicus* and *parens* of the emperor. Alexander says, "Domitium Ulpianum prefectum prætorio et *parentem meum*." The emperor was a young man. Again, Alexander says, "Secundum responsum Domitii Ulpiani, præfecti annonæ, jurisconsulti *amici mei*." (*x*) He served the state

(w) L. 1. pr. de cens. (50. 15.)

during the minority of Alexander Severus, and strove to render himself agreeable to Mammæa the mother of that emperor. He subsequently combined with her against the præfecti prætorio Flavianus and Chrestus, who were able men, and little disposed to flatter Augusta, or stood in the way of a limitation of the influence of the military. Subsequently, he united himself with them as a third præfecti prætorio, and at last had them executed. He then acted in the præfecture alone. His life was now in continual danger from the resistance and plotting of the prætorian guards. A revolution of the people, probably incited by the government, broke out against them and was suppressed. Ulpianus fled to Alexander Severus for protection, but was murdered by the prætorian guards in the first year of the emperor's reign, and before his very eyes. His death occurred in the year 228 A.D. Ulpianus is distinguished not only for the quality but for the quantity of his writings. He wrote upon both the civil and the prætorian law, also text-books and commentaries, as well as upon the Edict. His two greatest works are "libri LXXXIII ad edictum," and "libri LI. ad Sabinum." He is so copiously cited in the Pandects, that in regard to space alone, *one-third* of the Digest consists of quotations from his works, whilst the number of extracts, large and small, amount to no less a number than two thousand four hundred and sixty-two, or, according to the edition of the Pandects by the "Fratres Kriegelii," to two thousand four hundred and fifty-seven. He is the lawyer most frequently quoted in the Pandects, indeed we find his name almost on every page.

(x) L. 4. Cod. de locat. (4. 65.) L. 4. C. de cont. et com. stip. (8. 38.)

His "liber singularis regularum," or, as it is now called, his "Fragmenta," are especially deserving of notice for their beautiful and condensed language so admirably suited for a compendium. Ulpianus in these "Fragmenta," for style and expression, is far before Gaius. His phrase is so exact and concise, and every word is so well weighed, that it may be taken as a model for legal expression.

It is to be regretted that as a man his character is stamped with vice. The stain of the blood of his predecessors in the office of præfecturate was upon his hands, and if we are to credit Lactantius, who calls him Domitius, he was a fearful persecutor of the christians. Although Lactantius does not mention him by the name Ulpianus, there is now no doubt but that under the name of Domitius he refers to the same person. He was the contemporary of Papinianus and Paulus, and the three men constituted the most brilliant legal constellation of any age.

Paulus.

46. Julius Paulus was a friend of Ulpian's, and his junior in years; he flourished at the time of Alexander Severus; was præfectus prætorio; and sat in the imperial council. (*y*) He was one of the most diligent of the Roman legal writers, and the extracts from his works found in the Pandects amount to no less a number than two thousand and eighty-three. Nearly a third of the Digest is composed of quotations from his writings. Whilst the number is almost as great as that of Ulpianus, the extracts themselves are not regarded as equally valuable.

We have also an independent work of Paulus, but it is to be regretted that it is not in its original form;

(*y*) L. 97. de adquir. her (29. 2.) l. ult. de jure fis. (49. 14.)

namely, the "receptæ sententiæ," in five books. These have come to us through the West Gothic Code, the so-called "Breviarum Alaricianum" combined, as we have seen with Gaius and other writings, and are manifestly very corrupt. Such was long suspected to be the case, a suspicion since confirmed by the discovery of the "Vaticana Fragmenta." Paulus was a profound and thoughtful jurist, but he is very obscure, and confides too much to the student. This obscurity has been so much felt, that one of the old glossators in his chagrin exclaims, "O maledicte Pauli!" Three lines of Paulus often require as many pages of the modern jurists to explain them. Paulus wrote a great work in about LXXX libri "ad edictum sive ad edictum prætoris," also copiously upon the various senatus-consulta. His "manualium" "lib. sing. regularum sententiarum," and "lib. sing. de variis lectionibus," have been already mentioned. He was also the author of many other profound treatises.

47. Callistratus also lived under Sep. Severus and Antonius Caracalla. In his "libro I questionum," he says, "Nam imperator noster Severus rescripsi;" (*z*) and in another passage, he says, "Imperatores *nostri* Severus et Antoninus." (*a*) There are ninety-nine extracts from his writings in the Pandects. Callistratus.

48. Ælius Marcianus lived under Alexander Severus; he wrote on the Institutes, and is mentioned by Justinian in his Institutes "sicut Ælius Marcianus in suis Institutionibus refert." (*b*) He also wrote notes to Papinianus:—"In libro secundo de adulteriis Papiniani Marcianus notat." (*c*) There are two hundred

(*z*) L. 38. de cons. prin. (1. 3.)
(*a*) L. 3. de offic. proc. (1. 19.)
(*b*) Sec. 1. Inst. de leg. Aq. (4. 3.)
(*c*) L. 57 de rit. nup. (23. 2.) L. 7. sec. 1. (48. 5.)

and seventy-five extracts from his writings in the Pandects.

Florentinus. 49. Florentinus: XII libri Institutionus by him are quoted in the Pandects. There are forty-two extracts made from his writings. In his Institutes he departs from the order of Gaius, placing the Law of Inheritance nearly at the end of the work. He is mentioned by Justinian, and the Institutes of Florentinus were employed in the compilation of those of Justinian. He flourished under Alexander Severus.

Rufinus. 50. Licinius Rufinus. He is quoted only seventeen times in the Pandects. He wrote "libri regularum," and is not to be confounded with *Publius Rutilius* Rufus, of whom Pomponius says, "qui Romæ consul et Asiæ proconsul fuit."

Macer. 51. Æmilius Macer: there are sixty-two extracts from his writings in the Pandects. He wrote "de appellationibus," "de officio præsidis," and other works.

Paconius. 52. Paconius. Of whom nothing need be said.

Modestinus. 53. Herennius Modestinus. He was a scholar of Ulpian. The opinions of the juris-consults were frequently given to their pupils. Ulpianus in his commentary on the Edict mentions a legal opinion that he gave to Modestinus. "Herennio Modestino *studioso meo* de Dalmatia consulenti rescripsi." (*d*) He lived under Alexander Severus, but flourished under Gordianus III. He is the youngest of the classical jurists, who constituted the so-called *collegium* of deceased jurists, established by Valentinian III. Gaius was the eldest, and the remaining were Papinianus, Ulpianus, Paulus, and

(*d*) L. 52. sec. 20. de furt. (47. 2.)

Modestinus. He wrote upon the legal excuses of the tutor (excusationum), and a number of other treatises, from which there are three hundred and forty-five extracts in the Pandects. The only Greek extracts found in the Digest are taken from the writings of Modestinus.

VI. With Modestinus the illustrious race of the classical jurists closed, and there only remains to mention a few more unimportant names which are cited in the Pandects.

54. Hermoginianus. There are one hundred and seven extracts from his writings in the Pandects. He wrote "libri VI epitomarum," and also "fidei-commissorum." Hermoginianus.

55. Aurelius Arcadius Charisius. There are five extracts from his writings in the Pandects. He wrote "lib. sing. de muneribus civilibus," and other treatises. Hermoginianus and Charisius lived under Constantine, and are probably the last jurists quoted in the Pandects. The following names are mentioned, since they are also quoted; but not in chronological order, as it is not known with certainty when they lived. Charisius.

56. Furius Anthianus. He supplies only three extracts for the Pandects. Anthianus.

57. Rutilius Maximus. Only one extract. Maximus.

58. Julius Aquila. Two extracts. Aquila.

The above is a brief review only of the sources of the Roman law before Justinian. It now remains to present a compendious sketch of the legislation of that emperor himself, and especially to examine the several parts of the corpus juris civilis, and their relation to each other.

CHAPTER SECOND.

Of the Legislation of Justinian.

Section XVIII.—*A General Glance at this Legislation.*

The previous sources reviewed.

I. Let us take a glance at the previous sources of the Roman law, so as to bring to a focus all that has been previously said. Before the reign of the Emperor Justinian, in 527 B.C., there were two distinct elementary sources of the law, which were technically called *jura* and *leges*. The term *jura* was applied to the writings of the jurists: whilst that of *leges* was applied to the imperial constitutions.

The "citation law" of Valentinian III had been for a hundred years in operation. Thus the Roman judge was not obliged to regard the writings and opinions of all the Roman jurists, but only those of the five great masters of the law, whose names have been so frequently mentioned. When these were divided equally, the doctrine which had the additional sanction of Papinianus was regarded as the law. Or, the opinion of the majority decided. This was the rule in regard to the *jura*.

In regard to the *leges*, we have seen that three celebrated collections had been made. The Codex Gregorianus, the Codex Hermoginianus, and the Codex Theodosianus. In addition also to these codices, there was a number of scattered laws, made by the Roman emperors, called Novellæ, which the Roman lawyer was always bound to respect.

Justinianus.

The Roman Emperor Justinian, a man of excellent intention, possessing a species of boldness, indicative of mind and scientific knowledge, came to the grand resolution to make a complete reform in the Roman law, by bringing the *leges* and the *jura* into one collection. His uncle Justin appointed him co-regent in the empire with himself, on the 1st of April, 527, and on the 1st of August of the same year, upon the death of Justin, he governed alone, having then attained the forty-fifth year of his age.

He was favoured with a long reign in which to carry out his magnificent designs, having reigned alone from the 1st of August, 527, until the year 567, when he died.

Belisarius.

He was also fortunate in the men by whom he was surrounded. Belisarius, his great general, conquered Africa, and Italy was again conquered during his reign and united to the empire.

Tribonian.

Whilst the resolve to make a legal reform is to be placed to the credit of Justinian, the essential actor in this reform was Tribonianus. In the internal affairs of the court and empire as quæstor he possessed great influence; but, in the year 531, in consequence of a tumult of the people, he was superseded, but was soon restored, and resumed his former position and activity. He retained these till the period of his death, in 545. He possessed, for his time, unusual culture, a pliant, supple character, and was devoted to the interests of his master. Tribonian, considering the times, must be characterised as a distinguished man. He was the essential soul of the law. Not that he is to be so identified with the Roman law, as if it had sprung into existence by his creative act. This is a ridiculous error no longer made by jurists, but often made by

superficial writers. Justinian also informs us that Tribonian had an extraordinary library, and that from this source much that was valuable was derived.

That Tribonian was the main-spring of the movement does not admit of a doubt. And there are indubitable traces of his mind and knowledge of the law in the Novellæ of Justinian, up to the period of the jurist's death. Procopius informs us, not in his court history, but in his private history of the time, that the influence of the Empress Theodora was constantly exerted during the period of this great legislative reform of Justinian.

A legal commission appointed and the Codex vetus published.

Not many months after Justinian was seated on the throne of his uncle, he took the first step in his legislative course by appointing a commission, on the 13th of February, 528 A.D., to consolidate the laws by the formation of a new code. In this ordinance the emperor manifests a certain degree of weakness. Ten men were appointed, after the example of the Decemvirs, and the code was arranged in twelve books to resemble the laws of the twelve tables. This commission accomplished its work so rapidly, that on the 7th of April, 529, the new code was published under the title Codex Justinianus.

In the constitutio, entitled "hæc quæ necess," to be found at the commencement of our present codex, Justinian indicates the sources from which the materials for his code were collected—"in tribus veteribus codicibus, vel in quibus Novellæ constitutiones receptæ sunt."

Thus the Codices Gregorianus, Hermoginianus, and Theodosianus were superseded. No judge was for the future to refer to these, nor to the Novellæ Constitutiones, which had been received as scattered laws from the time of Theodosius up to the reign of Justinian.

The three codes just mentioned, as we have already seen, were complementary to one another, forming one compendious legal system. But the code of Justinian did not connect with these as a supplementary work: it contained in itself all the imperial constitutions that were in use, derived from all sources, whilst those that were not in use were discarded.

2. In the following year, Justinian advanced to his second great work; namely, the collection of the *jura*. In the place of a consultation of the writings of the five jurists, as ordained by Valentinian III, and a decision by a mere numerical majority, Justinian ordered that a collection should be made from the entire writings of the classical jurists. None were to be passed over: all were to be used. A numerical majority was no longer to be decisive; but a principle of internal interpretation was to be employed, all were to be diligently conned, and their opinions carefully weighed. Thus the five jurists and the principle of settling the interpretation by mere numbers were superseded; the number of jurists was not limited, and their opinions were not to be counted, in order to decide a point of law by so rude a method as that of a numerical majority. The Pandecten published.

On the 15th of December, 530, a commission of sixteen men was appointed, under the guidance of Tribonian, to accomplish this "opus desperatum," as Justinian called it. They were to finish their task in ten years, but the Digest was completed in three. This is much to be regretted; for, if they had diligently employed the time proposed, the work might have been vastly better done.

On December the 16th, A.D. 533, the collection of *jura* was published under the title of Digesta, or Pandects.

The term Pandects was expressive of the rich treasures contained in the *jura:* whilst the word Digesta was employed to indicate any comprehensive collection made from the writings of the Roman jurists, and had, as we know, been previously employed.

Thus the Pandects or Digesta of Justinian were composed out of more than two thousand books, and presented the legal views of at least thirty-nine jurists, as Justinian informs us in the "constitutio tanta," at the commencement of this great work. Extracts were made from these numerous treatises, and placed under appropriate titles. It was not a mere abstract of the writer's opinion that was given, but the very words of the jurist were extracted with the rubric or title under which he wrote. As for example; "Julianus libro II ad Ursium Ferocem," (*a*) "Ulpianus libro XIV ad edictum," (*b*) "Papianus libro XI responsorum;" (*c*) so that when we cast a glance at the Pandects, we find the opinions of the jurists expressed in their very words. Justinian says—"Pias igitur constitutiones jam antea duodecim contrahentes, codicem nostræ pietatis cognominem compesuimus;" thus he refers to the Codex, "nunc vero omnium veterum juris conditorum colligentes sententias e multitudine librorum, *qui erant circiter duo millia*, numerum autem versuum habebant *tricies centena millia*, in moderatum et perspicuum collegimus compendium. *Quinquaginta itaque nunc fecimus libros* e superioribus colligentes utilia, et omnes ambiguitates resecantes, et nihil adhuc dissidens relinquentes. *Quem librum Digesta sive Pandecten appellavimus*, tum quod legum contineat disputationes,

(*a*) L. 59. solut. mat. (24. 3.)
(*b*) L. 28. mandati vel contra. (17.1)
(*c*) L. 1. de pig. et hyp. (20. 1.)

ac decisiones tum ex eo, quod omnia in unum collecta recipiat, hanc ipsi ponentes appellationem; non ultra *centum quinquaginta versuum millia* ipsi dantes, et in *septem illum digerentes tractatus*, idque non temere, verum numerorum naturam et concentum spectantes. (*d*)

When the emperor says out of more than two thousand libri, we are not to understand distinct works, but principal divisions of works. Julianus for example had ninety "libri digestorum" in one work containing a digest of the law. The twentieth part of the whole of these libri was incorporated into the Pandects as we find that out of three million lines one hundred and fifty thousand were used, which is in the ratio of twenty to one. The Digest which was published on the 16th December, 533 A.D., contains extracts as we have seen from jurists commencing with Q. Mucius Scævola, who was consul 659 A.U.C., till the age of Hermogenianus and Arcadius Charisius, two jurists who lived in the time of Constantine and after the scientific period of Roman jurisprudence.

The compilation and publication of the Institutes.

3. During the last year's labour of the commission for consolidating the *jura*, it was found that the Pandecten, notwithstanding the great condensation which had been made, would not be a work suited for elementary instruction. In consequence of this, at the beginning of the year 533 A.D., whilst the commission was still active, a new one was appointed to compile a text book in the place of the Institutes of Gaius, which had to a certain extent become inappropriate and antiquated. This new commission consisted of two professors—Theophilus, a professor of the law in the school of Constantinople, and Dorotheus, a professor

(*d*) Cons. tanta. sec. 1.

from Berytus. Over these Tribonian was appointed as the nominal head. Justinian says, "Cumque hoc Deo propitio peractum est, Triboniano viro magnifico, magistro et exquæstore sacri palatii nostri, nec non Theophilo et Dorotheo viris illustribus, antecessoribus nostris . . . convocatis, mandavimus specialiter ut nostra auctoritate nostrisque suasionibus Institutiones componerent; ut liceat vobis prima legum cunabula non ab antiquis fabulis discere, sed ab imperiali splendore appetere; et tam aures quam animæ vestræ nihil inutile nihilque perperam positum, sed quod in ipsis rerum obtinet argumentis, accipiant."

The Institutes of Gaius and of Florentinus furnished the basis of the new Institutional work of Justinian. This legal compendium was so quickly composed that by the end of the same year it was completed, and was published on the 21st of November, in the year 533 A.D. Although this work on the Institutes was composed on the pattern of Gaius, and intended as a text book, it was not simply a text book, but was published as a Constitution of the emperor, and forms a substantive part of his legislation. In a word, whilst it was a book for the schools, it was a law for the empire. Thus the emperor himself speaks of the Institutes as an integral part of his legislation. In these three works, the Codex, the Pandecten and the Institutiones —the two former containing the *leges* and the *jura*— the great legislative reform of Justinian was completed, and the Pandecten and the Institutiones came into legal operation on the 30th of December in the same year.

The Quinquaginta decisiones.

4. During the period that the commission was employed upon the compilation of the Pandects, application was made to the emperor for the formal decision of

many points in dispute between the Roman jurists. It is obvious that it was very desirable that these controversies should be settled. These points were promptly decided by the emperor in the years 529 and 530, and are known as the "Quinquaginta decisiones." These appear to have been published as a "liber L constitutionum." (*e*) After this work was published a new edition of the Codex was rendered necessary. At once these "Quinquaginta decisiones" were incorporated into the old edition of the Codex, and on the 17th of November, 534, the publication of the "repetita prelectio" of the Codex took place. This new Codex came into legal operation on the 29th of December of the same year, and the old Codex of the 16th of April, 529, and the "Quinquaginta decisiones" were superseded. The new code was known as the "Codex Justinianeus repetitæ prælectionis." In the new code the old plan was retained, but the work was revised and the necessary interpolations and emendations were made. Of the Codex vetus which was thus superseded we possess no copy. It was forbidden to refer to it; not a single MS. of it exists, and the work is entirely lost. It was at the close of the year 534 A.D., that our present "Corpus Juris Civilis" was completed.

The Codex novus.

5. After these publications the emperor lived upwards of thirty years. He was as it were so intoxicated with the love of legislation, that a number of Novellæ leges, as they are called, making great changes in the law, were introduced. It was the intention of Justinian to make a collection of these Novellæ when they were completed, and to present them in an official

The Novellæ leges.

(*e* Sheurl's Instit. p. 31. note. II. s. 452. no. 241. Savigny Gesch. des R. R. im M. A.

form. This he did not live to carry into effect. No public collection was made, but they have reached us in the form of three private collections.

These Novellæ constitute the fourth and last part of Justinian's legislative labours. It is a singular fact, indicating the strong legal bias of the emperor, that whilst the Codex repetitus or novus was published on the last day of December, 534, the first of the Novellæ appeared on the first of January, 535—the very next day. Upwards of one hundred of these Novellæ exist, but the most important were published between the years 535 and 539 A.D. It was during this remarkable period that Tribonian was stationed near to Justinian, and in these Novellæ you can discover plainly that a great man is in the background. Thus the complete body of the Justinian legislation consists of the Codex, the Pandecten, the Institutes, and the Novellæ. The Novellæ are entirely in the Greek tongue, the other portions of his legislation are in Latin, with the exception of title 1, book 27, "*de excusationibus*," which contains extracts from Modestinus also in Greek, constituting the only Greek extracts in the Digest. The "Corpus Juris Civilis" contains the later law of the Roman Empire, and other sources must be consulted in order to gain an acquaintance with the early laws of Rome. It is also to be observed that the Digest is pre-eminently a practical work.

Summary. 6. In conclusion it may be mentioned that the Patents, as they are called, are quoted, as we have already shown, by the initial words with which they commence. A brief chronological review will be useful to enable the student more readily to remember the various dates that have been mentioned.

On the 13th of February, 528 A.D., the "Constitutio

hæc quæ necessario" was published. It contains the *instruction* to the legislative commission for the *vetus* Codex. It is to be found immediately before the present Codex and is addressed "Imperator Justinianus Augustus ad senatum urbis Constantinopolitanæ." Again, on the 7th of April, 529, upon the *publication* of the first Codex, the emperor put forth the "Constitutio summa reipublicæ;" this is the patent of publication, and is addressed as follows: "Imperator Justinianus Pius Felix, inclytus, victor ac triumphator, semper Augustus, Mennæ, præfecto prætorio, expræfecto hujus almæ urbis Constantinopolitanæ ac patricio."

A most important constitution was published on the 15th December, A.D. 530, namely, the "Constitutio Deo auctore," which contains the imperial ordinance by which the commission was appointed for the "opus pandectarum." It lays down the rules by which the commission was to be guided in this "opus desperatum" of consolidating the *jura*. This constitutio is found in two places: namely, before the Pandects, and as the constitutio I "de vetere jure enucleando, &c." in the Codex, book 1, title 17. In both places the title runs as follows: "Imperator Cæsar Flavius Justinianus, Felix, inclytus, victor ac triumphator, semper Augustus, *Triboniano quæstori* suo salutem."

Again on the 21st of November, A.D. 533, Justinian published his Institutes. On this occasion there was no special patent or constitution, but a "proœmium institutionibus." This proœmium is found immediately before the Institutes, with the date, from which it may be seen that it was issued scarcely a month before the publication of the Pandects.

The Pandects were published in the following month, namely December the 16th, A.D. 533. On this occasion

three patents appeared at the same time. One in Greek, commencing "Δεδωκεν ἡμῖν ὁ Θεὸς;" the Latin patent is known, as already mentioned, as the "Constitutio Tanta" and is addressed—"magno senatui populoque, et universis orbis nostri civitatibus;" the third patent is known as the "Constitutio omnem reipublicæ nostræ sanctionem," and was intended for the legal faculty at Rome, Constantinople and Berytus. This contains the new plan of instruction that was to be used in the law school, and after enunciating very fully the style and titles of the emperor it is addressed as follows: "Theophilo, Dorotheo, Theodoro, Isidoro et Auctolio, et Thallelæo, et Cratino, viris illustribus, antecessoribus, et Salminio, viro disertissimo, antecessori salutem." These three patents are found immediately before the Pandects.

Lastly, on the 16th of November, A.D. 534, Justinian published the "Constitutio cordi." This constitutio announces the publication of the Codex repetitus or the second codex of Justinian as now possessed by us. The Codex novus came into operation on the 30th of December, A.D. 534, but the date of publication was the 16th of the previous month, as above indicated. This constitutio, which is comparatively a brief one, is to be found immediately before the codex. It is advisable for the student to make himself familiar with the parts and names of the several portions of the "Corpus Juris Civilis" for the purpose of facility in quotation.

SECTION XIX.—*Of the Pandects.*

Of the several parts of the "Corpus Juris Civilis" the Pandects is by far the most important. Of this work the general description has been already given. It was Justinian's wish and intention to extract out of the entire and rich treasure of the Roman jurists all that was of practical value. Thirty-nine jurists are quoted, and a mosaic, so to speak, is made from their writings. There are a number of rubrics, and under these the extracts out of Papinianus, Ulpianus, Paulus, and others, as the case may be, are severally arranged. For a clearer conception of this great work it is necessary to mention first, the *Divisions* of the work; secondly, the *Manuscripts;* thirdly, the *Editions.*

I. *The different divisions of the Pandecten.*

Of the divisions of the Pandecten we find it necessary carefully to distinguish three.

Into titles and books.

1. The most important division is into books and titles. Under these titles are found the different fragments or excerpts taken from the jurists. There are fifty books in the Pandecten or Digesta: each book has a different number of titles, and each title has a particular rubric or inscription. The books themselves have no inscriptions. Again, over each fragment we have the name of the author, and also the work from which the extract is quoted. As, for example, in the first book, the number of the book alone is given,—"Liber Primus." Then we have, tit. 1., with the rubric, "*De justitia et jure.*" Then further, the first extract is from "Ulpianus, libro I., Institutionum," and so on. The books 30, 31, and 32 are not divided into titles, and these three books contain together the

theory of legacies and fidei-commissa. The title to each will be found to be the same,—"*De Legatis et Fidei-commissis.*" Fragment succeeds fragment in each of these three books without any further division. The remaining forty-seven books are divided into titles.

The systematic arrangement of the various materials, is made according to the Prætorian Edict, and most of the titles or inscriptions are found in the Edicta Prætoria, having been transferred from thence to the Pandecten.

As to the order of the Fragmenta themselves, the following questions may be asked: according to what principle were they arranged, whether there be any system, and, if any, how shall we ascertain it? Here was an enigma, the solution of which perplexed and baffled the best exertions of investigators for centuries. In our own time, Blume, in Bonn, has discovered and demonstrated the order in which the Fragments are arranged in the Pandecten. Hugo was perhaps not wrong when he said that Blume's singular discovery, both for diligence and acuteness, was the greatest that had been made in jurisprudence in our age. In all essential points the opinion of Blume cannot be doubted, and is now generally received as true. (*a*) The account is briefly this. The arrangement of the fragments is not systematic, nor scientific, but merely mechanical throughout. The *modus procedendi* appears to have been as follows. Blume has demonstrated from internal grounds that the commissioners appointed by Justinian in order to lighten their work divided the materials entrusted to their hands into three great masses. These he names the Sabinian mass, the Edictal mass, and the

(*a*) Blume's account of this may be found in vol. 4 of Zeitschrift für geschichtliche Rechtsw. pp. 257—373.

Papinian mass. To the Sabinian mass belonged the "libri ad Sabinium;" and these constituted its basis. This mass consisted of works which treated of the civil law in a systematic method. The second, or Edictal mass, consisted of commentaries and treatises on the Ædilitian and Prætorian Edict, books on the jus honorarium. The writings of Papinian constituted the basis of the third mass, and to these were added the writings of the casuists—the *questions*, *responses*, and the *monographical* writings of the Roman jurists.

It appears that the legal commission divided itself into three sections, and that each of these sections took one of the above masses. The scheme or plan upon which the commissioners were to proceed was previously arranged, and each section wrought out the mass or portion allotted to it apart and distinct from the rest.

When this part of the labours of the commission was ended they met again in their collective capacity, and the extracts they had made from the several masses were arranged according to the following principle. The number of groups of extracts were counted, and in arranging them under the titles, the greatest number was placed first. The natural result of this is, that in one title the extracts from the Sabinian mass came first, in another those from the Edictal, and in a third, those from the Papinian, or the extracts containing the *jus civile*. Blume has noted down every title of the Pandecten, and has shewn what are the extracts with which each title commences, and it is the number that decides the position that each collection of extracts shall occupy in the title.

That this is a singular and interesting discovery will be readily admitted. But this is not all; the

discovery is of great importance for purposes of interpretation. It is found that there are a number of the excerpts inserted in the masses to which they do not belong—Sabinian extracts in the Edictal mass, and extracts from the *jus civile* in the Sabinian. Now, when this is ascertained it is of great importance for the exegesis of the Pandects. This important discovery has recently led to a number of results in the interpretation of the Pandects that Blume himself could never have anticipated. So that his work is not a mere instance of acuteness, disclosing a matter of great antiquarian interest, but one leading to important practical results.

In the edition of the Pandects by the "Fratres Kriegelii," this valuable discovery is indicated. By turning to the various titles, the letters S.P.E. will be found, differently combined, to mark the order in which the various masses are arranged in the titles. At the end also of each fragment will be found one of these letters indicating the source to which the preceding extract is to be referred. Of course this useful addition is not found in the old editions of the Pandects.

Mode of quotation.

The fragments found under the titles are usually called *leges* and the usual mode of quotation is to mention the *lex*, then the superscription of the title, though this is often omitted, and then the numbers of the particular book and title. The *leges* also are divided into paragraphs; the first of these is not however numbered, but is called *principium;* and immediately after this commences paragraph 1, and then the numbers follow consecutively. This division into paragraphs was not made by Justinian, but was introduced by the glossators at Bologna, and is now found in all the late editions.

2. Another division of the Pandecten is that of the *septem partes*. This division was made by the commission itself, and the first five parts, as already shown, were used in the plan of study laid down for the legal student of Justinian's and of subsequent times. The last two parts, we have seen, did not enter into this plan. The prima pars extends from the 1st to the 4th book inclusive and this is called the "πρῶτα pars pandectarum." The second part includes from the 4th to the 11th book inclusive; and is called the "pars de judiciis." This second part takes its name from the 1st title ofthe 5th book. Justinian calls this the "pars de judiciis vel de rebus" in his plan of study. (*b*) The third part includes the following books to the 19th book inclusive, and was called the "pars de rebus," after the 1st title of the 12th book, "*de rebus creditis*." The fourth part contains the 20th to the 27th book inclusive, and as this includes the middle of the Pandecten, Justinian quaintly named it "pars quarta" or "*umbilicus pandectarum*." The fifth part contains the 28th to the 36th books inclusive, and is named "de testamentis" from the 1st title of the 28th book, which runs "Qui testamenta facere possunt et quemadmodum testamenta fiant." These were the 36 books treated in the lectures of the ancient professors of the law, and were distinguished from each other as we have above indicated. The *sixth* and *seventh* parts have no special names. The sixth contains the 37th to the 44th book inclusive; and the seventh part, the 45th to the 50th inclusive—that is to the end. The division into seven parts made by the Justinian commission is evidently derived from the *septem partes*

The septem partes.

(b) Cons. omnem rem. sec. 3.

of the Prætorian Edict. It is somewhat childish when Justinian says that the number seven is a holy number. It was not the sanctity of the number, but the division of the Edict that was before the minds of the commission. This division has at present no practical importance for the student. Traces of it, as we see, are found in the titles; and formerly an edition was published by Contiana. Lugd. 1571, a very neat and correct edition in small octavos, in which the Pandecten is contained in seven volumes, corresponding to the *septem partes* of the Edict. It has not been thought necessary to preserve the *septem partes* in the later editions, though it is still marked as above indicated.

Division into Dig. vetus, Dig. novum. and Infortiatum.

3. A third division of the Pandecten is derived from the glossators, and not from the Justinian commissioners. The division referred to was that into Digestum vetus, Infortiatum, and Digestum novum, given at Bologna.

The Digestum vetus comprises from the commencement of the Pandecten to the 2nd title of the 24th book inclusive. The inscription of this title is "*de divortiis et repudiis.*" The Infortiatum commences at the 3rd title of the 24th book, "*Soluto matrimonio dos quemadmodum petatur*," and extends to the end of the 38th book. These books relate to the law of inheritance generally; and speaking without great accuracy to matters relating to death. The Digestum novum commences at the 39th book, "*de operis novis Nuntiatione*," and includes the whole of the remainder to the 50th book inclusive. These three principal divisions are again subdivided each into two parts. The second part of the Digestum vetus begins with the 12th book, that of the Infortiatum with the 30th book, and that of the Digestum Novum with the 45th book.

There is some obscurity in regard to the Infortiatum. At the end of lex 82, "Ad legem Falcidiam," book 35, tit. 2, occur the words *tres partes;* from these words to the end of the 38th book were called *tres partes*, and were separated from the MSS., and treated apart and distinct. The glossators employed the term Infortiatum exclusively for the two previous parts; for example, they say, "Infortiatum cum tribus partibus," and Placentius (1192) and others add the *tres partes* to the Digestum novum. All our MSS. of the Pandecten have this division except the Codex Florentinus. All the editions that are glossed are found in three volumes; the first volume containing the Digestum vetus; the second volume, the Infortiatum; and the third volume, the Digestum novum.

Probable explanation of the term "Infortiatum."

We are entirely in the dark as to how this division arose and why these names were applied. The most probable explanation is given by Savigny, in his history of the Roman law. This view is derived from Odofredus (1265), who was not himself a glossator, but flourished at the close of the period of the glossators. Odofredus must not be confounded with Gothofredus the great French jurist who flourished in the 16th century. Odofredus informs us that Irnerius, the founder of the school of the glossators at Bologna at the beginning of the twelfth century (1140), did not possess a complete copy of the Pandecten, but only that part which is now called the Digestum vetus. Soon however there came from Ravenna the concluding part of the work, from the words *tres partes* in the lex 82, "Ad legem Falcidiam," book 35, tit. 2, to the end of the Pandects, and this part was called the Digestum novum. The middle part was still missing, from the 3rd title of the 24th book. Subsequently a more

perfect copy was discovered, by which the means were furnished to fill up the gap between the Digestum vetus and novum. This part, however, it is evident, was never entirely lost in Italy, as many have supposed, from the fact that it was not originally found by the glossators at Bologna. So Bartolus, in the rubric tit. D, "soluto matrimonio," at which point the Infortiatum commences says, "hoc volumen (Infortiatum) nunquam fuit amissum. Semper enim fuit totum volumen Pandectarum *Pisis*, et adhuc est." (*c*)

An abridgement was made of the Digestum novum by taking a portion of it from the *tres partes* to the end of the 38th book, which was brought into connexion with the middle piece. Thus this middle piece being increased, *auctum vel augmentum*, as Irnerius explains it, obtained the name of "Infortiatum," or augmented. The opinion that the Pandecten itself as a whole was augmented, is untenable, as it was not, but only the newly found middle part. The above explanation seems probable, but it is by no means absolutely certain. It seems scarcely possible that Irnerius could have read lectures on a work of which he possessed scarcely a fragment. (*d*)

Manuscripts of the Pandecten, and especially the Codex Florentinus.

II. *Of the manuscripts of the Pandecten.*

Among the numerous MSS. of the Pandecten, by far the most distinguished is the Codex Florentinus. This was the most esteemed MS. in the time of the glossators, and is often mentioned by them with great respect as the *lectio Pisana*. The MS. itself at the period of the glossators was not at Florence, but at

(*c*) See Mackeldey's Modern Civil Law," p. 91. note d.

(*d*) See on the *Tres Partes* Savigny Geschichte des Röm. Rechts, vol. 3. pp. 361—407. Hugo Lehrbuch d. jurist. Encyclopædie, 1823, p. 241. sqq. Puchta's Institutionen, vol. i. p. 745, et seq. who take a different view.

Pisa, and many a journey at the time of the glossators was taken to this place to ascertain its readings. In the year 1406 it was brought from Pisa to Florence, where it is still to be seen. The utmost care is taken to preserve this beautiful treasure of antiquity. It is preserved under a glass case, and a mechanical arrangement is contrived to turn over the leaves without placing a finger on the MS. itself. It is supposed to have been for centuries at Amalfi, and after the siege of this place to have been sent to Pisa. There is, however, no certain historical data upon which to found this opinion. That it is not the original copy of the Pandecten, which Justinian sent to Italy, as has been asserted, is proved by the vellum and the writing; but it is supposed to have been written by a Greek at Constantinople, in the seventh century, and to have been sent from thence to Italy, in which country it has ever since remained. It is written with extraordinary care, and is the oldest MS., by several centuries, of the Digest at present in our possession. The most ancient among the remaining MSS. is not older than the twelfth century, so that the Florentine MS. is at least 500 years older than the most ancient we have yet discovered. These date from the age of the glossators and subsequent. It is, however, not only the oldest, but the most accurate of any. It has been maintained that the alterations in the more recent MSS. are merely variations from the Codex Florentinus. If this were correct, there would be an end to all criticism, and a comparison of various readings would be simply useless. In every case of doubt the proper method would be at once to have recourse to the Florentine MS.

Antonius Augustinus, the great Spanish jurist,

as well also as Lælius and Franciscus Taurellius, who published a valuable edition of the Pandecten, maintain that all the vulgate MSS. are derived from the Florentine MS. This assertion is supposed to be sustained by the circumstance that in the last title of the Digest a singular confusion has arisen by the misplacing of two pages in the binding of that MS. So that in the book L., tit. 17, the leges or fragmenta 158 to 199 are misplaced and come after lex 117; and, singular enough, this error is repeated in all the other MSS. This is the principal fact relied on to prove that the Florentine is the parent MS. of all. It is, however, regarded by civilians as by no means conclusive.

In the Codex Florentinus there are a number of *lacunæ* or gaps, which, so far as they occur in the forty-three books, are not found in the other MSS. When these are carefully examined it is evident that they could not have been filled up by mere conjecture or analogy. Savigny has collected these so that they may be viewed and compared at a glance; and when this comparison is made, it is impossible to avoid coming to the conclusion that other MSS. besides the Codex Florentinus were in the hands of the glossators. (*e*) This, however, does not detract from the value of the Florentine MS. The glossators without doubt, possessed others, and this gave rise to a "litera communis sive Bononiensis," as distinctive from the "litera Pisana."

The litera communis sive Bononiensis.

Thus a textus receptus was elaborated at Bologna, now spoken of as the *lectio vulgata*, having for its basis the Codex Florentinus and other MSS., which have not been handed down from antiquity to our age.

(*e*) Savigny's Geschichte des Röm. R. im M. A., vol. 3. pp. 418

This lectio Bononiensis was spread in numerous MSS. all over Europe, and contains the text and the recension of the glossators. The result is, that to have a correct criticism, the Codex Florentinus must be consulted; but the readings of the other MSS. must not be ignored, as other MSS. were employed in the recension of this editio, or lectio vulgata, by the glossators, which at present it is not in our power to consult.

III. *As to the best editions of the Pandecten.*

Principal Editions of the Pandecten.

It is unnecessary here to make a long list of editions of the Corpus Juris Civilis; we will, therefore, only notice certain editions of the Pandecten, as this work was often published alone. Of the Pandecten there are three editions with which it is advisable to be acquainted.

The editio princeps.

1. The editio princeps, which is glossed, is the Digestum vetus. Perug. per Henr. Clayn., 1476, folio. Infortiatum Romæ per Vitum Pücher, 1475, folio. Digestum novum per Vitum Pücher Rom., 1477, folio. This is the oldest known edition of the Pandects. It is printed with great correctness, and is regarded as most valuable. It is only to be found in public libraries. The basis of this edition and of the subsequent ones, till the Lyons edition of 1510, is the lectio vulgata.

The lectio Haloandrina s. Norica.

2. The next edition to be noticed is the lectio Haloandrina s. Norica, ex. rec. Greg. Haloandri (Haffman in Zwickau), Norimb., 1529, in quarto, without the glosses. This is a critical edition, also of very great value, and is remarkable for the extraordinary critical acuteness which it exhibits. Unfortunately MSS. are mentioned by Haloander, as having been used by him and collated for this edition, without his indicating the names of these MSS., and the sources

from whence he derived them. In consequence of this a suspicion has arisen that he made a pretended reference to MSS. which he had never seen. But it is certain that learned men often took away MSS. from libraries which were not returned, but fell to their heirs, and were by the latter, in ignorance of their value, flung aside as useless. In this way it is known that many MSS. have disappeared in Europe; so that the circumstance that no MSS. are to be found by which to verify the readings of this edition, is not sufficient evidence to invalidate the statement or representation of Haloander.

This edition is very rarely to be found. It is sometimes in one volume, sometimes in two or three volumes, and is so printed that it may be thus bound. This should be remembered, as an opportunity to purchase it should never be allowed to pass. The price of copies purchased on the Continent has varied exceedingly. Savigny is said to have given three times as much for his impression as Rosshirt, having paid several hundred florins—so the latter jurist informed the author.

Cura Lælii et Francisci Taurelliorum.

3. The third edition is that of the Cura Lælii et Francisci Taurelliorum, Flor., 1553, in folio, without the glosses. These editors, who are said to have been father and son, were two learned Italians, and this edition is a faithful copy of the Codex Florentinus; it is not in the least altered. The possessor of this edition has the advantage, to a certain extent, of having the Florentine MSS. immediately before him. The edition is very elegant, both as regards the paper and the largeness of the type. It is also found in one, two, or three volumes, and is of great value.

These three editions of the Pandecten ought to be carefully noted. First, the "editio princeps," as the first edition of the Pandecten; secondly, the "editio Haloandrina, or Norica," as containing many and valuable criticisms; and thirdly, the "editio Taurelliorum," as a reprint of the Codex Florentinus.

SECTION XX.—*Of the Institutes.*

The plan of the Institutes.

I. As to the plan of the Institutes. The Institutes, as we have already intimated, were compiled upon the basis of the Institutes of Gaius, reference being made at the same time to the Institutes of Florentinus. This work of Justinian, having the authority of an imperial constitution, superseded the work of Gaius, which had been in use for more than three centuries. The antiquated laws found in Gaius were removed, and the alterations in the law up to the period of Justinian's legislation were incorporated. The definitions of Gaius are often repeated by Justinian, or are retained in form, and varied only in expression to suit the alterations made in the opinions of the jurists and the altered laws of the times.

The Institutes of Justinian, like those of Gaius, are contained in four books. Each book is divided into titles, and each title has an inscription or rubric. The titles again are divided into paragraphs. Each title does not commence with paragraph one, but with an introductory paragraph, which is quoted as *principium*. The paragraphs one, two, &c., then follow regularly. The number of titles differs in the four books.

The treatment of the subject is based on the famous division given by Gaius in his Institutes. "Omne jus quo utimur, vel ad personas pertinet vel ad res, vel ad actiones." (*a*) Thus the *juris divisio* is the same both in Gaius and in Justinian. The first book contains the "jus quod ad personas pertinet," both in Gaius and in Justinian. The second and third books treat of the rights of property—the "jus quod ad res pertinet;" namely, ownership, jura in re aliena, law of inheritance, and obligations. The subject is the same in both Gaius and Justinian—the law of property in the most extensive signification of the term. The fourth book treats of actions and legal procedure—"quod ad actiones pertinet." The fourth book of Gaius commences at once with the division of actions into actiones *in rem* and *in personam*. The fourth book of Justinian, on the other hand, for the first five titles, treats of obligations arising out of delicts; and the sixth title commences "De Actionibus." The treatment of actions by Justinian is much shorter than by Gaius. This arises from the circumstance that in Gaius we have a full account of the ancient mode of procedure called the *legis actio*, and also of the mode of legal procedure in use subsequently to this, named *per formulam*. This is omitted in the fourth book of Justinian, so that this book was greatly reduced. Justinian had no occasion to treat of the "legis actiones," nor of the "formulæ," as they were not in use in his time. To make up for this diminution in the bulk, the five titles, treating of obligations arising out of delicts, were added by the emperor to his fourth book.

(*a*) Gaius, bk. 1. sec. 8.

Manuscripts of the Institutes.

II. As to the MSS. of the Institutes. These are almost innumerable, as since the age of the glossators there was no jurist who did not possess a MS. of the Institutes. This was not the case with copies of the Pandects. Through this multiplication of copies of the Institutes, the public libraries of Europe are flooded with MSS. of this work. But they are all of the age of the glossators and subsequent, with the exception of three, which are of the tenth and eleventh centuries. These, it is to be regretted, are incorrectly written and imperfect; so that there is none which, for accuracy and authority, can compare with the Codex Florentinus of the Pandecten. There is a fragment of a MS., consisting of four quarto leaves, in the Capitular Library at Verona, which is supposed to be of the seventh century; and there are also 88 leaves of a very old copy in Turin, with a gloss of the age of the Byzantine rule in Italy. (*b*) An account of the various MSS. may be found in the valuable and critical edition of the Institutes by Eduardus Schræder, Berolini 1832, quarto.

The Editions of the Institutes.

III. As to the different editions of the Institutes, for critical and educational purposes, the following are especially to be noticed.

1. The editio princeps, of Peter Schöffer, of Gernsheim, Mogunt., 1468, in folio. This edition is among the earliest results of the printing press set up at Mayence, and is known as the glossed edition.

2. Ex rec. Greg. Haloandri, Norimb. 1529; a valuable and critical edition. This and the following editions are not glossed.

(*b*) Savigny's Gesch. des R. R. im Mittelalter, vol. 2. pp. 199, and 429—476. Sheurl's Institutionen, p. 40.

3. Cura Jac. Cujacii, Paris, 1585, in folio.

4. Edition Fr. Aug. Biener, Berol, 1812, in octavo.

5. Edd. C. A. E. Klenze et E. Boecking, Berol, 1829, in quarto.

6. Cura Ed. Schræderi, Berol, 1832, in quarto; also stereotyped in Berlin, 1836, duodecimo. This edition of Schræder, a thin quarto volume, almost the size of folio, is deserving of special notice. It is a masterpiece of criticism, and all but supersedes every other edition. Schræder united with a number of legal friends, intending to produce a critical edition of the entire Corpus Juris Civilis, after the most minute and searching investigation of MSS., editions, and every other source that could aid in the production of a perfect text. The scheme only partially succeeded. Some of his associates died, and others grew weary and forsook the work. Schræder still lives, and has completed this perfect and beautiful edition of the Institutes. It will be a cause for great regret to the civilian if the treasures that have been accumulated should be lost. Both for criticism and exegesis, they would be of immense value. It would require a number of volumes to edit the entire Corpus Juris Civilis, and embody the whole of these valuable materials in a commentary upon the plan proposed. The small stereotyped edition is published for a trifle; the larger edition is expensive.

7. Institutionum et Regularum Juris Romani Syntagma exhibens Gai et Justiniani synopsin Ulpiani librum singularem regularum Pauli sententiarum delectum tabulas systema Institutionum Juris Romani illustrantes præmissis duodecim tabularum fragmentis. Edidit et brevi annotatione instruxit Rudolphus Gneist, U. I. (*c*) Dr. Lipsiæ, 1858. This is an invaluable work

(*c*) U. I.—utriusque juris.

for the student; no other edition comprises the same condensed amount of information. Professor Gneist gives the valuable text of Schræder for the Institutes, and that of Boecking for Gaius. The student can thus at once compare the two great institutional writers, as they are arranged on the same page. Gneist is an eminent professor of the civil law in the University of Berlin, and the hand of a master is to be traced throughout the entire work.

8. The Institutes of Justinian, with English introduction, translation and notes, by Thos. Collett Sandars, M.A., late Fellow of Oriel College, Oxford. London, 1853, octavo. This is not a critical edition, and the text is principally that of Hermann, with the readings of Schræder occasionally introduced. The text is derived from the edition of the Institutes given by the Fratres Kriegelii, in their edition of the Corpus Juris Civilis. Mr. Sandars gives an admirable translation, and his introduction and notes, though brief—especially the introduction, which is perhaps too short and rapid a sketch—will be found very valuable to the English student. A second edition has been published, and this book and the Institutiones of Gneist should be found in the hand of every student of the Roman law, at the commencement of his legal course.

SECTION XXI.—*The Codex and Novellæ.*

I. Here we have to direct special attention to the Codex repetitæ prælectionis, as the Codex vetus calls for no further explanation. The Codex repetitæ prælectionis.

1. As to the plan of this work. We have already The plan of this code.

explained that the intention of Justinian was to consolidate all the practical Constitutions of the emperors, from the reign of Hadrian to his own time. Those of Hadrian were the most ancient incorporated in the Code. Before his reign the Constitutions were wrought into the *jura*, and so treated by the jurists that it was not necessary to go further back than this reign. It was indeed, principally the Constitutions from the reign of Severus to Justinian inclusive, that were consolidated in the Codex.

All these materials were brought together and divided into twelve books. In this respect the same plan was pursued in the Codex repetitæ prælectionis as in the earlier Codex vetus. Each book consists of a great number of titles, and each title has an appropriate inscription. In these titles are embodied the Constitutions, and the arrangement is strictly chronological. The earliest Constitution always comes first. Each *lex* or Constitution has the name of the emperor and the person or persons to whom it was addressed. For example: book I title 1. "De summa Trinitate, et fide Catholica, et ut nemo de ea publice contendere audeat." Then follow the names of the emperors: "Impp. Gratianus, Valentinianus, et Theodosius ad populum urbis Constantinopolitanæ." At the end of each Constitution is found the name and date of the month, and also the magistrates pro tem.; as in the Constitution above quoted, the *subscriptio* is as follows: "Dat. III, Kal. Mart. Thessalonicæ, Gratiano V, et Theodosio A.A. Coss." Although this general plan is admirably conceived, unfortunately both the inscriptions and subscriptions are full of errors. In the Kriegelian edition of the Codex, Hermann has endeavoured to ascertain and correct these errors, so that

the new edition of the Codex, for this reason, is to be preferred. The correctness of both the superscriptions and subscriptions is of great importance as regards the interpretations of the passages themselves; as when several Constitutions relating to the same subject come together, the exact determination of the persons, the times and the places, aid materially in ascertaining the precise thought contained in the law itself.

Manuscripts of the Codex.

2. As to the MSS. of the Codex. These are innumerable, but none are as old, nor for correctness comparable with the Codex Florentinus of the Pandecten.

We possess at the present time the fragment of a very old MS.—a rescriptus, consisting of seventy-one leaves, in the Cathedral library at Verona. This MS. contains the Greek Constitutions. Then there are also two incomplete MSS. of the date of the tenth century, at Pistoria and Monte Cassino.

The MSS. originating in the school of the glossators contain only the nine first books of the Codex. Irnerius passed over the three last books as possessing no practical value, and these were omitted by the copyists under the name of *tres libri*. These MSS. contain scarcely any inscriptions and superscriptions, and none of the Greek Constitutions.

The inaccuracy of the MSS. of the Codex renders the criticism exceedingly difficult. This inaccuracy, also, is not only *qualitative*, but *quantitative*. The Greek Constitutions are defective, hence it became a proverb: "Græca non legimus." The fact that the Greek Constitutions had to a great extent disappeared from the MSS. has led the editors of new editions to exert themselves to repair these defects from other

sources. Augustine, Charondas, Cujacius, and Contius, in the sixteenth century, and Witte, Biener, and Heimbach in our own, succeeded in partially restoring them from the Basilica, τὰ βασιλικὰ (νόμικα) also ὁ βασιλικὸς νόμος, the Acts of the Council of Ephesus, and other sources. The parts restored are for this reason called "leges sive constitutiones restitutæ." (a) But these "leges restitutæ" do not avail as practical law, as the restoration having taken place since the age of the glossators, they are all of course unglossed. It is the "lex glossata," as it is termed, that can be alone quoted in those countries that receive the Roman law into its jurisprudence. Hence the maxim has arisen, "Quicquid non agnoscit glossa nec agnoscit curia."

Still these "leges restitutæ" are of much importance as far as regards interpretation, so that the modern editions of the Codex are regarded as possessing a much higher practical value.

Editions of the Codex.

3. As to the editions of the Codex, there are two to which special attention should be directed. (1) The glossed editio princeps for the first nine books, Mogunt Mayence per Petr. Schoyffer de Gernsheym, 1475, folio; for the last three books Rom. per Vitum Pücher, 1476, folio. (2) Ex rec. Greg. Haloandri, Norimb., 1530, folio.

To these may be added the edition of Contius, Paris, 1562, folio; that of Russard, Antwerp, 1567, *folio*; and that of Charondas, Antwerp, 1565, folio. These are the principal editions published separately, and not as parts of the Corpus Juris Civilis regarded as a whole. The edition of the Codex by Greg. Haloander

(a) Mackeldy Mod. Civ. Law, p. 58.

is by no means so celebrated as his edition of the Pandecten already noticed.

II. We have now especially to mention the Novellæ. The Novellæ consist of constitutions in the Greek language, published by the emperor at different dates after the Codex. The Codex was published on the 31st Dec., 534, and the first Novellæ, it will be remembered, the following day, 1st Jan., 535. The Novellæ.

1. Justinian did not make an official collection of the Novellæ. This was his intention, but he did not live fully to accomplish his legal plan. In consequence of this failure of purpose we possess only private collections of the Novellæ. Of these the following three are worthy to be noticed. Not an official collection.

a. One of these collections was made during the lifetime of Justinian, towards the close of his reign, by Julianus. Julianus was distinguished as an antecessor or professor of the law. His collection was in the Latin language, and it is often named as the Novellæ for the Occident. It is not a Latin translation of the Greek original Constitutions that is given, but the Novellæ are re-wrought, and Julianus Antecessor, as he is called, was satisfied in presenting the substance of the originals in a condensed form. 125 Novellæ are treated in this manner. The Epitome Novellarum, or Juliani.

The Epitome Novellarum,—Liber Novellarum, as it is usually cited, of the Constantinople professor, was also widely spread in the East, and was referred to as the Epitome Juliani, whilst the Greek originals were scarcely known. Puchta is of opinion that this collection was made in order to enable the emperor more easily to govern Italy. (*b*) This selection from the

(*b*) Puchta Inst. vol. 1. p. 740.

legislation of Justinian was more extensively spread in Italy in the time of the glossators than any other. For this collection they used the terms novellæ, or liber novellarum, or lex Romana merely, and similar expressions.

The versio vulgata or corpus authenticum.

b. About the same time—at the end of the sixth century—a Latin translation of the Novellæ was made by an anonymous author, which contains 134 Novellæ. This faithful translation, now termed the *versio vulgata*, was called by the glossators the Corpus Authenticum, in order to distinguish it from the Epitome Juliani. Proceeding upon this as a basis, they divided the Novellæ into nine collations. (*c*)

The *versio vulgata* is more complete than the Julian Epitome, but not so complete as the Greek. It is a literal verbal translation, but it is wretchedly done, and the meaning is often mistaken. The Epitome of Julian is generally true to the thought, and gives the correct meaning. The *versio vulgata*, as to quantity, approaches more nearly to completeness than the Epitome of Julian, but falls far short of the entire body of the Greek Constitutions.

The Byzantine or Greek collection.

c. Apart from the above-mentioned Julian Epitome and the *versio vulgata*, an oriental collection of the Novellæ was made in the Greek language. This Byzantine collection consists of 168 Novellæ and other authoritative documents—namely, some Novellæ of later emperors, and four edicta of the Præfecti Prætorio, to which is to be added thirteen so-called Edicta Justiniani, also in the Greek tongue; whilst in addition to the above collection we are in possession of the so-called Index—the Index reginæ, from the

(*c*) Mackeldey Mod. Civ. Law, pp. 59, 60.

library of the Queen Christina of Sweden, and two MSS. complementary to each other—one a Florentine, and the other a Venetian MS. (*d*)

Receptio of the versio vulgata.

2. It appears that the glossators were not acquainted with the Byzantine or Greek edition of the Novellæ; or if they knew of this collection, they appear entirely to have ignored it. They had merely the two Latin collections—the Juliani and the *versio vulgata*. At the commencement of their labours they seem to have had only the Epitome Juliani, the Liber Novellarum, of Justinian; but after a short time the *versio vulgata* became the acknowledged text.

The arrangement of the versio vulgata and the modern editions.

The *versio vulgata*, as already stated, consisted of 134 Novellæ. The genuineness of some of these was at first questioned by Irnerius, but ultimately received by him and used as possessing authority in the school at Bologna. Whilst the Epitome Juliani was circulated and quoted as the Liber Novellarum, so the *versio vulgata* was spread abroad and known as the Liber Authenticorum or Authenticum. The whole of this Latin translation or Liber Authenticorum was not regarded as of practical importance—thirty-seven Novellæ were thus rejected—ninety-seven only were received and *glossed*, as it is termed, at Bologna. These ninety-seven Novellæ, or ordinariæ authenticæ were arranged in nine collationes, or as it were in nine books. This was done after the pattern of the nine books of the Codex. Each collatio was arranged in titles, and each title has a rubric and contains a Novella. This arrangement is quite different from that of our present editions of the Novellæ. The Novellæ excluded from this collection, were called extraordinariæ or extrava-

(*d*) Sheurl Instit. p. 44.

gantes and were arranged in three collationes, tres libri. Subsequently, however, part of these last authenticæ were inserted in the MSS. of the IX collationes.

The present editions of the Novellæ differ from these early copies, both as regards quantity and arrangement. As to quantity, the authenticæ contains 97 Novellæ, our present editions 168. As to order or arrangement, the old exemplars were divided into collationes, titles, and novellæ. In our editions the Novellæ are numbered regularly from 1 to 168. Thus the mode of quotation is very different at the present time from that which was in use formerly. The arrangement in the MSS. and early editions of the times of the glossators and subsequently, was superseded after the 16th century, and the new mode introduced. It is difficult to find the quotation as made by the glossators in our present editions. To obviate this difficulty in the edition of the Fratres Kriegelii two tabula synoptica are given, one "Novellarum, constitutionum et collationum;" by means of these synopticæ tabulæ the passage quoted by the glossator may be ascertained at a glance. The tabulæ will be found between the preface and the novellæ. It is however a disadvantage, or at least an inconvenience, that the quotations of the earliest commentators are made with reference to MSS. and editions arranged upon a different principle from that which regulates editions used in modern times.

III. The principal editions of the Novellæ are the following:—

1. The editio princeps Romæ per Vitum Pücher, 1476, folio—in connexion with the last books of the Codex. This is the glossed edition; it contains the 97 received Novellæ of the authenticum, with some

of the authenticæ extravagantes. This edition has merely the Latin text of the versio vulgata. The following editions are not glossed :—

2. Græce et Latine cura Greg. Haloandri Norimb., 1531, folio.

3. Græce cum Novellis Leonis et Justiniani edictus XIII, ex. rec. Henr. Scrimgeri, Geneva, 1558, folio.

4. Ed. Contii, Paris, 1559, folio.

5. Novellæ Constitutiones ex. Græco in Latinum, conversæ et notis illustratæ a J. F. Hombergk zu Vach, Marb., 1717, quarto. This is an admirable translation by Hombergk, far more readable than the versio vulgata, and is now found in all the new editions.

6. A new edition of the Authenticum was published by G. C. Heimbach, in Lips., 1851. Marezoll, in his Institutes, calls this a new edition of the Novellæ, with rich critical apparatus; but this is a mistake. It is not a new edition of the Novellæ, but simply the Authenticum in its original form. Heimbach's object was to present the Liber Authenticorum as it was in the times of the glossators. (*e*)

SECTION XXII.—*Of the Corpus Juris Civilis itself.*

Names of Corpus Juris Civilis and constituent parts of the work.

I. We have already seen that the expression "Corpus Juris Civilis" was not an official name, but that it arose by accident in the seventeenth century. Dionysius Gothofredus employed the phrase first in the year 1604, in his second collected edition for the entire system of the legislation of Justinian. Up to

(*e*) Marezoll's Institutes, p. 119.

this period the Digest, Codex, Institutes, and Novellæ had been cited separately and as substantive works. From the time of Gothofredus the term "Corpus Juris Civilis" has been unanimously received, and has been used to distinguish the Justinian collection of the civil law from the Decretum Gratiani, the Decretales Gregorii IX, and the other Papal collections, which have been known under the title of Corpus Juris Canonici. Thus a twofold distinction is made. The imperial law is known as the Corpus Juris Civilis, and the collections of Papal law as the Corpus Juris Canonici. When the words "Corpus Juris" alone are used, we understand the Corpus Juris *Civilis*. But when we wish to speak of this collection in opposition to the Corpus Juris Canonici, the entire phrase "Corpus Juris Civilis" is employed. Hence the *four* books of the Institutes, the *fifty* books of the Pandecten, the *twelve* books of the Codex, and the 168 Novellæ of Justinian together compose the Corpus Juris per eminentiam, or the Corpus Juris Civilis. It is, however, to be observed that all the editions of the Corpus Juris are not limited to these constituent parts; but this arises from the arbitrary will of the editors. Much is added to render the book useful and saleable; as for example—the Justiniani Imperatoris Edicta; the Imp. Justini Augusti Novellæ Constitutiones; the Imp. Tiberii Augusti Novellæ Constitutiones; the Aliæ Aliquot Constitutiones Imp. Justiniani, Justini et Tiberii A. ex diversis fontibus collectæ, atque Nov. V, et Nov. CXXIII, Antiquæ Versiones a versione vulgata diversæ; the Imp. Leonis Augusti Novellæ Constitutiones; the Feudorum Libri cum Fragmentis, which treat of the feudal law; the Constitutiones Aliquot Imperatorum in prioribus non comprehensæ;

and the Acta de pace Constantiæ, et cet. All these are found in the edition of the Corpus Juris Civilis, by the Fratres Kriegelii, but they must not be regarded as constituent parts thereof.

Editions of the Corpus Juris.

II. As to the editions of the Corpus Juris Civilis, they are legion. Since the fifteenth and sixteenth centuries they have been multiplied till they have become almost innumerable. A volume might be filled with the titles alone. These editions are of all sorts and in all sizes. A jurist should, however, possess at least three different editions—namely, a *glossed* edition, one that is *noted*, and a *critical* edition.

1. *An edition that has the glosses.*

These afford a perfect mine of wealth for the interpretation and exegesis of the Corpus Juris. The glossators possessed a knowledge of the contents of the Corpus Juris that a modern jurist cannot attain—a minute knowledge that, with present claims and duties, it is indeed all but impossible to acquire. There are a number of different glossed editions of the Corpus Juris, but the older editions are not good. That of Fehii is the best and most recent: "Stud et opera Jo. Fehii Lugd., 1627, six vols., folio." The Corpus Juris itself is contained in five volumes; three for the Digestum vetus, Infortiatum, and Digestum novum; one for the practical part of the Codex; and one for the remaining part of the Codex, the Institutes, and the Liber Authenticum. The sixth volume is a register, and contains an index rerum by Davids.

2. The editions with notes must not be confounded with those that are glossed. These notes are placed under the text, and are sometimes mistaken by those who are commencing the study of the Corpus Juris for the glossed editions. The best of the *noted* editions

is that of Gothofredus, by Sim. van Leeuwen, Amstell. 1663, folio; and the impression of this work, "with clasped hands," as the continental jurists denote it (mit geschlungenen Händen)—Francof. ad Moen., 1663, square folio—is valuable. The Frankfort edition is found in one or two volumes. In the Dutch edition Simon van Leeuwen has attained to extraordinary correctness. The work forms a large folio volume, and the notes are partly under the text and partly in the margin. A third and critical edition of the entire Corpus Juris is that so often mentioned, by the Fratres Kriegelii. In this edition the Codex is edited by Professor Æmilius Hermannus, of Gottingen; the Novellæ by Edwardus Osenbruggen; the Institutes by Hermann, and the Pandecten by the combined labours of the above editors and the Kriegelii themselves. This edition is known as the Leipzic stereotyped edition. It is valuable, as it possesses so many additions and little aids not found in other and more ancient editions. The work is in three royal octavo volumes, and is both portable and inexpensive. In the third volume are found the Leonis Constitutiones, the Libri Feudorum, and a number of other additions to the Corpus Juris, all of which are enumerated above. The introduction of the letters S. P. E. to indicate the Sabinian, Papinian and Edictal masses, added to the critical correctness of this edition, render it one of great value. There is only one drawback—although the paper and type are good, the latter is necessarily small, which, when this edition is much used, may give rise to some inconvenience. As English eyes, however, are far stronger than those of Germans, this drawback will be found to affect the British student far less than the German. This valuable edition is indis-

pensable. The next best edition for ordinary use is that of Spangenberg, in two volumes, square quarto, Gottingen, 1776, 1797. The type of this edition will be found to be very clear, and it is altogether an admirable one for constant use.

Present mode of citing the Corpus Juris Civilis.

III. The following remarks embody, in as few words as possible, the present mode of citing the Corpus Juris. A more detailed account shall be given in the next paragraph.

Mode of citing the Digestum.

1. The Pandecten falls, as we have seen, into books, titles, and laws or paragraphs. At present we cite as follows—first the *lex*, as lex 2, then the *rubric* (*i.e.*, the inscription to the title), then the number of the *book* and the number of the *title*. The word *lex* is now generally employed; formerly the word *fragmentum* was in use; it is not incorrect, but *lex* is now more commonly used. Thus we say, lex 3: or lex 2, § 1: or lex 2 principium, for the extract preceding § 1. In writing, l. is used for lex, fr. for fragmentum, § for paragraph, and d. for digestum. Dig. is superfluous: for example, lex 1, § 2, digestum "de origine juris et omnium magistratum, et successione prudentum." Book I, title 2, is abbreviated as follows: l. 1, § 2, d. de orig. juris (I, 2); or simply, as the digest is often quoted, l. 1, § 2, o. j. (I, 2). The number of the book and the title are placed in a parenthesis, and are separated simply by a comma; thus, l. 24, § 1, de pign. (XX, 1). This is now the most approved and usual way of quotation, and it is perfectly clear and simple. In the previous century ff. was used to indicate the digest; this was universally the case. How this originated and what is its explanation is now much questioned by civilians—whether it be a Roman D, or a Greek Π. May it not be used simply for the plural

of fragmentum, as pp. is for the plural of pagina, ll. for the plural of lex, and other similar instances? And since instead of ff a capital F is written, may not this be upon a principle of compensation, the capital F being regarded as equal to the two small ones. If the Digest as a whole be regarded as a collection of fragmenta, this appears to be a rational explanation. Dr. Vangerow, to whom the writer has mentioned this, it is right to observe, is of opinion that this is not the explanation. Others have supposed that it is a capital D with a mark across it, to indicate that it is an abbreviation of the word Digestum. How this mode of indicating the Digest originated is not now with certainty known.

The last law in a title is often quoted as *lex ultima*, and the last but one as *lex penultima*. If the entire title is to be consulted, the phrase *totus titulus* or simply tt. is used, and the phrase *conferatur rubricæ* when the words of the inscription only are to be cited.

Mode of quoting the Codex.

2. The mode of quoting the codes is precisely the same as to the principle, but C is written for Codex. Cod., as is sometimes written, is superfluous, but the C *should never be omitted.* Thus lex 1. sec. 2. Codex "de vetere jure enucleando, et de auctoritate juris prudentium, qui in digestis referuntur" (Book I, title 17) may be simply abbreviated and written as follows, l. 1 sec. 2, C. de vet. jure (I, 17). Many jurists write a small c. for codex as they use l. for lex, but the larger is now more generally adopted.

And the Institutes.

3. The Institutes are not quoted as fragmenta or as leges, but simply as paragraphs, thus section 2. I. de rer. div. (II, 1). It is not necessary to write Inst., a single I. is sufficient. The introductory paragraph is called *principium*, and is denoted by a simple *pr.*

4. The Novellæ are now quoted quite differently from what they were in the time of, and subsequent to, the glossators. It will be remembered that they are all numbered regularly from Nov. I to Nov. CLXVIII, and they are quoted as Nov. XVIII, Nov. C, and so on. Nov. is written, and not a simple N, as the latter is often used for Number: thus, Novellæ CXV, chapter 3, paragraph 1, is written Nov. CXV. c. 3, §1. And the Novellæ.

IV. The above explanation of the mode of citing the Corpus Juris contains all that is requisite in order to comprehend and to find with ease the quotations of modern writers in the recent editions of the Corpus Juris Civilis. These explanations should be carefully studied and remembered, as they only contain what is absolutely necessary. The next paragraph is to be referred to when further explanation is required. Further particulars as to quotation.

a. When it is desirable to quote several extracts of the same title in succession in the same or different divisions of the Corpus Juris, it is done as follows:

§ 6 J. de inoff. test. (II. 18):

L. 8, § 6, d. eod. § ult. J. eod. (*i.e.*, eodem sc. titulo) (V. 2). The d., indicating Digestum, may be omitted.

b. When it is desirable to quote from the title corresponding to the title containing the subject treated of, it is indicated as follows:—

L. 3, d. h. t. (*i.e.*, hujus tituli, or hoc titulum) (XXIII, 3); that is, when, in treating of the doctrine of the Dos, the title of the Digestum "de jure dotium" is intended to de quoted.

c. In quoting the Pandects the number of the book and title, when it is one of frequent occurrence and well known, is frequently omitted, thus: for l. 26, d. de verb. oblig. s. (XLV, 1) is simply written l. 26, de v. o.

d. The books 30-32 of the Digestum have only one title with the same rubric—"De legatis et fidei commissis." These are cited thus:—

L. 3, D. de legatis I., read in primo (XXX).

L. 24, D. de legatis III (XXXII).

e. The Authenticum in the Codex is quoted as follows:—

Auth. si qua mulier C. ad S. C. vell. (IV, 29).

f. When it is wished to quote from the Codex Theodosianus, and at the same time to cite from the Codex of Justinian, it is thus denoted:—

L. 5, C. Th. de spectat (XV, 5).

L. 7, C. J. de feriis (III, 12).

L. 22, C. J. de appell. (VII, 62)

L. 26, C. Th. cod. (XI, 30).

g. We have seen that the Novellæ are usually cited by means of figures. As the several Novellæ are divided into a *præfatio*, *chapters*, and an *epilogus* these are sometimes indicated as—

Nov. 18, præf., or simply pr., &c.

h. Some writers quote exclusively with symbols, and name the extracts from the Pandecten *fragmenta*, those from the Codex *constitutiones* intead of *leges*; for example:

§ 8, J. 2. 6. This is for the Institutes.

Fr. 26, D. 45. 1. For the Digestum.

C. 12, § 1, C. 8. 18. For the Codex.

It is better to indicate briefly the rubric, as it is a check upon the figures, which may be easily misquoted or misprinted.

i. In the glossators and in the old literature the quotations were made universally, or almost so, by quoting the commencing words and without using numbers, as:

Inst. de usucap., § aliquando etiam, or (later), § aliquando etiam Inst. de usucap.

L. generaliter D. (or ff, or F) de v. o.

The glossators quoted the Novellæ thus:—

Auth. de hered, ab intest, § si quis, colla IX (tit. j., *i. e.* primo).

The Codex thus:—

C. de pactis, l. pacta novissima. (*a*)

In all the above cases where d. is used for denoting the Digestum it is unnecessary, as it may be always understood when the other parts of the Corpus Juris are carefully denoted.

(a) See especially Scheurl Inst. p. 46, et seq. Maresoll Inst. p. 119, et seq. Böcking Inst. secs. 11—22, vol. I. 1843, and Introduction in his Pandecten, secs. 10—24. Schilling's Lehrbuch für Institutionem, etc. secs. 23—42. Leip. 1834.

CHAPTER THIRD.

ON THE FATE OF THE LEGISLATION OF JUSTINIAN, BOTH IN THE EAST AND IN THE WEST, AFTER THE TIME OF THE EMPEROR.

SECTION XXIII.—*Of the fate of the Justinian Legislation in the East, and especially in the Byzantine kingdom.*

It is only necessary in an institutional treatise briefly to refer to the principal points of a topic that might be greatly extended. The following particulars must suffice for our present object.

Commentary on the law forbidden by Justinian.

I. Under Justinian himself and his immediate successors a very rich judicial literature arose. The revolution in the entire legal system of the empire accomplished by Justinian had given a wonderful impulse to legal literature. This emperor, wishing to avoid any alteration in the changes he had inaugurated with so much zeal and care, had strictly forbidden all elaborate commentary on the law, as a practical inconvenience. Although tardy in completing the structure of his own legal system, he resolved that when completed it should remain a solitary and proud monument of his wisdom, from which the minds of beholders should not be distracted by inferior or rival works; a temple whose portals should remain so wide, so high, and so visible, that no guides should be required, as none should be allowed, to explain the way, or lead the perplexed to the awful shrine of Justice.

The literature was at first limited simply to Greek paraphrases of the text, and none of the writers dare venture on the forbidden ground of a Latin commentary on the original laws themselves. The new jurisprudence was, however, re-wrought in the Greek language, and short notes or Scholia were added. To a certain extent this was a necessary work, as the Latin tongue was a language foreign to the Orient.

The Paraphrase of Theophilus.

Among the most important of the works of this period, especially for our present study, is the Greek paraphrase of the Institutes written by the celebrated professor of the law, Theophilus. Theophilus was one of the three persons appointed by Justinian to compile the Institutes. "Triboniano, viro magnifico, magistro et exquæstore sacri palatii nostri, *nec non Theophilo* et Dorotheo, viris illustribus antecessoribus * * * convocatis, specialiter mandavimus, ut nostra auctoritate nostrisque suasionibus componant Institutiones." Upon the Institutes thus composed Theophilus delivered lectures in the Law School at Constantinople, and these lectures have been handed down in several MSS. and editions to our own time. They contain an elaborate and extensive development of the Institutes, and attained to great authority with the Byzantine jurists—indeed, to almost exclusive authority in the East. In the year A.D. 533, the Institutes themselves were published, and in A.D. 543, the lectures of Theophilus.

It is a singular circumstance that Theophilus seems not to have used the Codex repetitæ prælectionis in his paraphrase of the Institutes. This appears from the fact that alterations which had been made in the Codex after its second publication are not found in the readings of the code as quoted by the author of the paraphrase.

As one of the authors of the Institutes, it was natural and reasonable to suppose that his paraphrase upon that work would contain a treasure of the most valuable kind. Still, for a long time Theophilus was treated as a testis suspectus. Many of his statements of fact were questioned or rejected by continental critics as contradicting certain notions which possessed their minds, and which they held against his authority for undoubted verities. Since the discovery of Gaius, the folly of this mode of criticism has been so felt and acknowledged by eminent jurists, that probably for some time there will not be a repetition of the senseless treatment of ancient authors in regard to their categorical statements of such facts as must have been well known to the writers at the time. It would be well if the confirmation of the statements of Theophilus were better known to those peddling critics in other departments of ancient learning, who have no scruple in lopping off whole clusters of facts as alleged by ancient authors, and then calmly pretending to write history upon *quasi* facts, or rather conjectures which, like Goethe's mannikin, have been merely elaborated in the crucible of their own fancy. It must be admitted by all who know German critics, that in other departments of study than law, facts have been so treated that not a few writers have penned their own fantastic conjectures and imagined they were writing history, instead of the tamest fiction or the dullest and silliest romance. It is to be hoped that the nibbling criticism of Germany, so rife in more departments of study than the one under consideration, may not ultimately stultify the practical common sense of Englishmen. The treatment of Theophilus should be a caution to all, and make us hesitate before we deny the statements of a

writer on account of difficulties and apparent discrepancies which may at once vanish like a morning mist upon the approach of the monarch of day.

Since the discovery of the Institutes of Gaius the authority of Theophilus has been constantly on the increase. Assertions made by him, mistrusted by some and denied by many, have been recently demonstrated to be true. Gaius has supplied the lost link and furnished the clue by which the statements of Theophilus have been confirmed. Since the year 1820 his paraphrase has been regarded as worthy of the most careful study, and the authority of no ancient writer has so wonderfully increased in so short a time. We have no recent good edition of Theophilus. The only edition suitable for use is that of W. Otto Reitz, Hague, 1751, in two volumes, quarto. This edition has a Latin translation and notes. A very faithful German translation, accompanied with critical remarks and a comparison of parallel passages, has been published by Wustemann, in two volumes, octavo, Berlin, 1823.

The Basilica.

II. Minute detail in this sketch and for our present object is unnecessary. We may pass over centuries as furnishing no work of importance or meriting notice in the present review. At the end of the ninth century flourished the emperor Basilius Macedo, who reigned from 867 to 886, and his son, called Leo Philosophus, who reigned from 886 to 911 A.D. Under these emperors was compiled the really great and comprehensive work called the Basilica, ὁ βασιλικὸς νόμος, the imperial legislation, or τὰ βασιλικὰ (νόμικα), the imperial law.

As the Latin language, in which nearly all the legislation of Justinian appeared, was not generally used among the Byzantines, Greek translations of the

Institutes, the Digestum, and the Code, very soon appeared. These Greek translations were imperfect, and possessed no official character, but although made by private persons, they soon came to be used more than the originals themselves. This great work of the two emperors was the first compilation and translation from the writings of Justinian made officially in the Greek tongue.

Plan and use of the Basilica

The plan of the work was as follows:—The Institutes, the Pandecten, the Codex, and the Novellæ of Justinian, were entirely re-wrought, and from them one work was composed. This work was contained in 60 books; each book was divided into titles; and each title, as in the Digest of Justinian, had an appropriate rubric or inscription. The Codex was taken as the basis of the Basilica, but the fragments taken from the four parts of Justinian's legislation, after being translated into Greek, were arranged under the heads or subjects to which they belonged. Such was the external form of the work. To this text, thus consolidated, *scholia*, or short notes, were added, which were taken from the writings of former Byzantine jurists. From these remarks it will be evident that in the Basilica we have the legislation of Justinian in the main only presented in a revised form. In the 17th century Fabrot published an edition of this work, and by his publication rendered very great service indeed to every student of the Roman law. (*a*)

The Basilica presents a perfect treasure for the interpretation of the Roman law which is by no means exhausted. It may be objected that at the time this work was composed the Orient had become almost

(a) Fabrot in 7 folio vols., Paris, 1647.

barbarous; and it may be asked of what use can the writings of people in that age be to us. It should however be remembered that the bulk of the work embodied in the Basilica was done in the interval between the age of Justinian and Leo Philosophus, although it was not officially consolidated and published till the 9th century—that MSS. were used that belonged to the times of Justinian himself—that they had the writings of Paulus and of Ulpian in their perfect state—in a word, the compilers of the Basilica had documents and sources to aid them that no longer exist, or are found now only in a fragmentary and corrupted form. Of course there are many errors in the Basilica, but in all difficult passages in the Corpus Juris Civilis recourse should be had at once to this important work.

All possible search has been made in the East and in the West for a perfect copy of this work, but in vain. At Athos four books were found, but still we have not more than two-thirds of the entire work. Twenty-nine books have reached us complete, ten are imperfect, and of the remainder we have only the extracts furnished by Fabrot.

Of the editions of this work there is the edition in seven folio volumes mentioned above—*βασιλικῶν* libri LX, in VII tomes, divisi, Paris, 1647, folio. This edition was subsequently supplemented by Ruhnken (Meermann thes. III, V); by Reiz (Meermann thes. V. Theophil, p. 964, sqq.); by Witte (basil. tit. de div. regulis juris, Vratisl., 1826, 4); by Pardessus (collection des lois maritimes, Paris, 1828, 4. tom. I., p. 179 sqq.) A new critical edition has been published by the brothers C. W. E., and G. F Heimbach, commenced in 1833 at Leipsic, and completed, in five

volumes, in 1851. (*b*) Heimbach's edition in five quarto volumes entirely supersedes the older editions. It contains the Greek text and a good readable Latin translation: the text of Fabrot furnishes the basis for the text of this edition, but it is much improved. The older editions may not only be dispensed with, but are now rendered useless.

The Hexabiblus.

III. It is only necessary in this section to mention one other work namely, a book published in the middle of the 14th century, entitled "Πρόχειρον νομον τὸ λεγόμενον ἡ ἑξάβιβλος" (manuale legum dictum Hexabiblus), by Constantinus Harmenopulus, in the year 1245. This work, as the title indicates, consists of six books, and contains the private law of Justinian. It is an enlarged work on the Institutes. This ancient book is rendered especially worthy of notice by the fact, that on the 23rd Feb., 1835, it was published in Greece, as furnishing the basis of the new legislation designed to be employed in that country. The latest edition of this is by G. F. Heimbach, the younger Heimbach, now deceased. It is to be regretted that he died too soon. Heimbach resided in Leipsic, and his brother in Jena published this work as an *opus posthumum*. The title is "Constantini Harmenopuli manuale legum dictum Hexabiblus cum appendicibus et legibus agrariis," 1857. The work of Heimbach, contains the Greek text and a good Latin translation. There are other oriental writings to which attention might be directed, but the above are the most important to be noticed; and to these, our remarks must be limited. This department of jurisprudence is called "Jus Græco

(*b*) See Marezoll's Instit. p. 96. Puchta's Instit. vol. I. pp. 721, 722. Mackeldey Mod. Civ. Law, pp. 66, 62. Heineccii Ant. Rom. Procemium, sec. 37. et notæ. i. k. l., and Vangerow's Pandecten, vol. I. pp. 11, 12.

Romanum," or Byzantine Law. Great service has been rendered in this department of the law by Biener and Witte in their various writings, especially by Zacharia, formerly in Heidelberg, and also by the Heimbachs. The works of Zacharia entitled "Delineatio historiæ juris Græco Romani, Heidelberg, 1839," and the same author's "Ἀνέκδοτον," lib. XVIII. tit. 1, Basilicorum cum scholiis antiquis, &c., Heidelberg, 1842, should be carefully consulted on this part of Roman and Byzantine jurisprudence. Rosshirt, still living, the intimate friend of Zacharia and his late colleague in Heidelberg, suggests that by the combined efforts of Zacharia and the distinguished men whose names have been mentioned, copious materials are furnished for a history of the law of Justinian in the Orient, down to the present time, and that this might be appropriately arranged under the following four periods: 1, from Justinian to Heracleus; 2, from Heracleus to Basilius; 3, from Basilius to the Turkish conquest; 4, from that time to the present. (*c*)

Section XXIV.—*Of the fate of the laws of Justinian in the Occident.*

Justinian's legislation intended for the East.

I. In the time of Justinian Italy belonged to the Roman empire; and although at first the legislation of Justinian was only intended for the East, after Justinian had conquered the Ostrogoths, who then ruled Italy, and had reduced that country under his authority, the various portions of his legislation were at once sent to Rome, introduced into the courts, and, as we

(*c*) See Mackeldey's Mod. Civ. Law, p. 61.

have already seen, lectured upon in the law school of this mistress of cities. This statement is confirmed by the Sanctio Pragmatica of 554, which has been preserved by Julian in his Epitome of the Novellæ. It was formerly a very common opinion that the Roman system of jurisprudence disappeared at Rome after the sixth century of the Christian era; that it was entombed till after the twelfth century, when it arose and came forth from its grave through the influence of the school of Bologna. This opinion was the result of a chain of historical errors, which has been pointed out by Savigny in his admirable work on the "Roman Law in the Middle Ages." This great writer has proved that whilst the Roman law was still known and used in the East, it was never ignored in the West. That it was not only received in Italy, but that it likewise prevailed in many other lands. (*a*)

The causes of its diffusion in the West.

There are two circumstances worthy to be mentioned. The clergy were favourable to the Roman law. The spirit of the Codex was agreeable to them, and they were pleased with the ethical basis of the Pandects exhibited in the regard paid by the great Roman jurists to the universal element derived from the *jus gentium*. Thus whilst the law of Justinian became the law of the clergy in the East, it was regarded by the clergy of other lands, in the times of concurrent different national laws, as their own special law for all secular matters. As Mackeldey, following Savigny, correctly observes, the best evidence of this is furnished by the largest yet unprinted Collectio Canonum (Anselmo. dedicata), the seventh part of which treats *de laicis*, and derives its contents under the head *Capit-*

(*a*) See Vols. 1 and 2 of Savigny's Rom. Recht in M. A.

ula legis Romanæ ad eandem septimam partem pertinentia, for the most part from the Institutes, and the remainder from the Codex and from Julian's Epitome. Afterwards the clergy ceased to regard this as their law, when, through the celebrated Collectio Gratiani, which was undertaken at Bologna 1151, the designed antithesis of the *jus civile* and *canonicum* was introduced by Gratian himself, with the object of presenting two *universal* systems of law to the world. (*b*)

Again, when the Germans in the middle ages overran the Roman empire, they did not ignore the personal rights of the conquered, but wisely allowed the conquered to live under their own laws. In consequence of this, when German nations were formed on the ruins of the Roman empire, the Roman law was allowed to prevail. The German conquerors made laws for themselves, and codes were established for the conquered. Thus the West Goths received the so-called Breviarium (Alaricianum) or the lex Romana of Alaric II, promulged in the year 506, A.D.

This Breviarium (Alaricianum) contains: 1, a selection from the Codex Theodosianus in sixteen books; 2, the Novellæ of Theodosius, Valentinianus, Martianus, Majoranus and Severus; 3, a brief, corrupted edition of the Institutes of Gaius, at present usually known as the Epitome Gaii or the West Gothic Gaius, which is contained in two books; 4, a selection out of the Sententiæ of Paulus; 5, a selection out of the Codex Gregorianus, as also from the Codex Hermogenianus; 6, a passage from Papinian's l. 2, responsorum. All these extracts, except the third (the Epitome Gaii), are accompanied by an interpretation.

(*b*) See Mackeldey Com R. L. 69.

Ed. pr. of Sichard; Cod. Theod. libri XVI, quibus sunt, &c., Basel, 1528. But the latest and most masterly edition is that of G. Häuel: Lex Romana Visigothorum, Lips., 1849, quarto.

The Ostrogoths, again, had the Edictum Theodorici, which consisted of a compilation of imperial laws and passages from the Sententiæ and Responsa of Paulus. It was promulgated after the year 506. The principal edition of this work is by Pithous, 1579, at the end of Cassiodori Opp. The latest edition is by Rhon: "Commentatis ad Ed. Theod. regis Ostrogoth," Halæ, 1816, quarto.

Again, the Burgundians had the so-called Papianus or lex Romana. In a very old MS. this code has the inscription, Papianus, lib. I, responsorum. It was compiled between the years 517 and 534, A.D., and contains a number of legal precepts, partly taken from the Breviarium, partly from pure sources of the Roman law. Editio pr. was published by Cujacius, 1566, after the Cod. Th. The latest edition is by Barkon: Lex Romana Burgundionum Gryphiswald, 1826, octavo.

Hence, notwithstanding the downfall of the Roman empire, the Roman law was continued for the conquered people, and extended far beyond its original domain into Spain, France and England. We have thus indubitable proofs that the Roman jurisprudence neither slumbered nor ceased to exist, but that its influence was felt and its existence continued until it arose to world-wide fame under the extraordinary labours of the glossators.

Before the time of the glossators reference was made in the legal writings of France to the legislation of Justinian. This is proved by the appearance of a book published in 1070, entitled "Petri exceptiones legum

Romanorum." The word *exceptiones* in this title is not used in the processual sense, as indicating pleas, but simply as meaning extracts. According to Savigny, this book originated near Valence, in France, before the middle of the eleventh century. It was also re-written so as to adapt it to Italy, which has occasioned a difference of opinion as to the place of its origin. The author of it is not known otherwise than by this production. The work contains, in four books, a systematic exhibition of the law then applicable in France, which is for the most part Roman law. It is evident at a glance that this Petrus was in possession of the Codex, the Digest, and the Institutes of Justinian, (*c*) as well also as the Epitome Juliani.

The Brachylogus.

A work deserving attention appeared a little later, known as the Brachylogus. In one of the MSS. of the imperial library at Vienna this work is inscribed, "Summa novellarum constitutionum Justiniani Imperatoris." It is, however, more generally known by the title, "Corpus legum per modum Institutionum," or "Brachylogus juris civilis." The Institutes form the basis of this work, though the Codex, the Digest and the Novellæ are also laid under contribution. The work presents a compendious system of the Roman law. It appeared originally in Lombardy about the year 1100, and is the work of an unknown author. The title Brachylogus was first given by a later jurist.

The school at Bologna and the glossators.

II. A much more active period dates from the beginning of the 12th century. From the 12th till the 13th constituted an important epoch in the history of the Roman law in the West. It was during this interval that

(c) See Mackeldey, Mod. Civ. Law, p. 69. Savigny l. c., vol. 2, p. 130, also Spangenberg Einleitung, p. 583.

the law school of Bologna rose to importance. Pepo appears to have been the first who delivered lectures in this place, but Irnerius, who succeeded him at the commencement of the 12th century, and who obtained great celebrity, is to be regarded as the true founder of the reputation of this illustrious school. In the documents of the 12th century he is sometimes called Magister Guarnerius, or Warnerius de Bononia; and Odofredus calls him "prima illuminator scientiæ" and sometimes "lucerna juris." (*d*) To this school students of the law flocked from all parts of Europe, to hear the doctrines of the Roman law, and to learn them as they were pronounced by the very lips of the *domini*. In this school there was found for the space of two centuries a race of the most distinguished jurists. Not only were they great as teachers, but they were great as expositors and interpreters of the Roman law. Unfortunately these men, known as the glossators, had not at their command all the means for the interpretation of the law possessed by later jurists. They had no Ulpian—no Gaius—no Basilica; but were necessarily limited to the Corpus Juris in the strict sense of the term. Still, when we consider the paucity of their means, it is wonderful that they accomplished so much, and it cannot be denied that the glossators manifest the most keen and brilliant acuteness. They were better acquainted with the Corpus juris than any lawyers either before or since their time. Such was the accuracy of their knowledge, that they may be said to have known it literally and by heart.

The glosses.

1. The glosses themselves of the different *domini* consisted of short comments and brief notes and

(*d*) See Hugo's Civ. Mag., vol. 6, pp. 34 and 388.

scholia written between the lines (glossæ interlineares) and on the margins (glossæ marginales) of the MSS. When the MSS. were copied, the glosses were also copied and circulated with the notes of the masters of the law. Most of these MSS. which contained the separate glosses are lost, so that all the glosses of the individual *domini* have not reached to our time. This arose from the circumstance that Franciscus Accursius in the middle of the 13th century determined to make a selection of the glosses, a "delectus glossarum," containing those that were of the greatest practical and theoretical value. This collection is known as the "glossa ordinaria" or the "glossa Accursiana." Subsequently to this period the MSS. having the glosses of Accursius were in demand, and thus most of the MSS. with the several separate glosses are lost. Still Savigny with great diligence has traced many glosses that are not found in the "glossa ordinaria." Accursius has given the very words of the glossators and has sometimes inserted notes of his own. The several glosses often conflict, and Accursius often passes over this contradiction without expressing his own or the current opinion. The "glossa ordinaria" was subsequently enlarged by additions from later jurists.

Production of the "litera bononiensis."

2. A second and important scientific work of the glossators, as has been already mentioned, was the production of a critical text of the Digestum, known as the "litera bononiensis," or at the present time as the "lectio vulgata." This MS. of the Pandecten presents the accord of the glossators as to the true text, a text in the formation of which principles of scientific criticism were applied, and in which not only the Codex Florentinus was employed, but other MSS. which are now probably lost.

The authenticæ.

3. Irnerius and his successors endeavoured to facilitate the study of the law by the interpolations of extracts from the Novellæ of Justinian into those parts of the Codex which were modified by the new legislation. These extracts from the Novellæ were put in their proper places in the Codex and are known by the name of Authenticæ. The quotations thus inserted were treated as a part of the text, and were in a similar manner clothed with glosses. The Authenticæ are still to be found in all the editions of our Codex. There is some uncertainty as to the origin of the term Authenticæ. It has been generally supposed to have originated from the expression *glossæ Authenticæ*, but in all probability the term Authenticæ arose from the inscription to the interpolated passages themselves, namely "*in* Authenticæ"; as by this the glossators understood the Novellæ from which the extract was derived. (*e*) These Authenticæ must not be confounded with the complete Novellæ themselves, to which we have seen the glossators applied the title "Corpus Authenticum," to distinguish them from the extracts of Julian. In regard to the way of citing the Authenticæ, the following mode is employed. When we quote them the word Auth. is placed first, then the initial words, and lastly, the heading of the title in which they are contained; or the inscription, as well as the number of the book and the title; for example: Auth. Et non observato C. de testamentis vi, 23; or Auth. Si qua mulier C. ad S. C. Vel. (IV, 29.) The Authenticæ from the Novellæ, of which there are 220, are quoted even more than the Novellæ themselves. Thus, the glossators were not only great as

(*e*) See Mackeldey Mod. Civ. Law, p. 67, and note *e*.

teachers, but to them we are indebted for the *lectio vulgata*, and these Authenticæ interpolated in the Codex. It is necessary to mention that these extracts from the Novellæ have no legal authority, except so far as they agree with the Novellæ from which they are derived.

There are thirteen extracts from later ordinances of the emperors Frederick I and II, who reigned at the middle and at the close of the 12th century, inserted in the Codex by the glossators of Bologna. These are known as the Authenticæ Fridericianæ, and, as later constitutions, have the preference over the earlier ones. They have generally the inscription, Nova Constitutio Friderici, and are quoted in the same manner as the extracts from the Novellæ above referred to.

Influence of the glossators and spread of the Roman law.

III. Through the influence of the glossators the Roman law spread in a wonderful manner, extending not only over the eastern empire, but over Europe generally, and becoming as it were naturalized in Germany. It was found in France, in Spain, less in England than in Belgium, in Holland, but especially did it flourish in Germany. This is to be accounted for by the following circumstances.

Roman law favoured by the clergy.

1. It was favoured by the clergy, and as their influence rose and the power of the papacy increased in christendom, notwithstanding the opposition of the petty princes who clung to their national law, and especially the opposition of the inhabitants of northern Europe, the Roman law increased and spread, until it became the prevailing jurisprudence for a great part of Europe. At the tribunal of justice, the princes were seated, or their representatives, on one bench, to apply the principles and usages of the ancient national law,

and on another bench were seated the learned Doctors and Professors of the civil law, equally, and at times, unreasonably intent upon extending the principles and practice of the Roman jurisprudence. As the princes were often distracted by wars, and were often vastly inferior in mental attainments, it is easy to perceive how the learned in the law would soon be able to push forward and extend, as was really the case, their own peculiar doctrines.

Internal cause.

2. Then again there was an internal cause. When a people attain to a certain point in civilization they cease to be satisfied with their own strictly national law, or it no longer suffices for the altered condition of the nation. Under such circumstances there usually happens what took place at Rome in the 6th and 7th centuries of the state, when the universal element was introduced on the basis of the *jus gentium*. Thus it was also with the Germans. Their particular national laws and customs became insufficient, and by what has been deemed a happy circumstance the laws of Rome were introduced. It is no wonder that such was the case, as the scientific beauty of the Roman jurisprudence was such that it was fitted to form a *ratio scripta* for the whole civilized world. When the ancient laws and customs of the several nations of Europe are carefully examined, and especially those of the German people, the ameliorating and beneficial influence of the Roman law becomes at once strikingly obvious. It does not admit of a doubt but that it produced a benevolent change in the savage and harsh laws and customs of many German tribes and nations.

Cause of its spread in Germany.

3. As far, however, as relates to Germany there was also a special circumstance. The powerful German monarch felt proud in setting up his claim as

the successor of the Roman emperor. He challenged to himself the supremacy of all Europe in temporal affairs, as the pope set up a similar claim in matters spiritual. It was held that the German empire was in point of fact a continuation of the Roman empire, and the German ruler the successor of the Roman emperor. This view in the middle ages had great influence in the introduction of the Roman law. It was not the introduction of a foreign system, or it was not thought to be such, but the restoration of the laws of the forefathers, and such indeed it was often named in the laws of the empire.

In Germany there is no definite period which can be pointed at as indicating precisely the introduction of the Roman law. Its introduction was not settled by statute, nor by ordinance, but by custom. But custom has so distinctly determined this that it does not now admit of a doubt that the Roman law is a constituent part of the jurisprudence of Germany. The student should carefully retain in his memory the influence of the school at Bologna, that of the clergy and the popes, as well as the influence of publicistic views which have been so briefly indicated.

IV. There is another point that it is necessary to understand. An important maxim is "Quidquid non agnoscit glossa, nec agnoscit curia." The meaning of this maxim is to be derived from the fact that in the Eastern empire as well as in Germany and the West it was not the whole of the Corpus Juris that was received. Only a part of it was recognized by the school in Bologna and glossed by the *domini;* hence, the meaning of the maxim is, that what the glossators did not recognize, the tribunals do not receive. Thus there are large portions of the Corpus Juris

The maxim "quidquid non agnoscit" &c.

Civilis that were not known to the glossators. These, although of great importance for the interpretation of the part that was known to them, which is consequently glossed, are not recognized by the modern judge. In those lands where the Roman law is received it is not the opinions and the interpretations of the glossators that are binding, but it is the text itself that has this force. Still, it is only those parts of the Corpus Juris that the glossators received and glossed that will be recognized by the courts. Beyond this their opinions may be, except for purposes of interpretation, entirely disregarded.

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